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In The
SUPREME COURT OF THE UNITED STATES

No. 79-383

Term, 1979

UNITED STATES OF AMERICA

vs.

F. W. STANDEFER,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

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F. W. Standefer petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit entered August 10, 1979 is attached hereto as Appendix A, infra (pp. 1a-72a).

The said opinion and dissenting and concurring opinions are those of the court en banc on matters reargued before the Court of Appeals for the Third Circuit. The Judgment Order of the Court of Appeals for the Third Circuit, entered August 10, 1979, is attached hereto as Appendix B, infra (p. 73a). The letter of the Clerk of the Court of Appeals for the Third Circuit directing matters to be considered before the court en banc, dated March 14, 1979, is attached hereto as Appendix C, infra (p. 74a). The opinion and order of the district court on defendant's motion for new trial, entered May 24, 1978, is attached hereto as Appendix D, infra, (p. 75a).

Jurisdiction

The judgment of the court of appeals was entered on August 10, 1979 (App. A, infra, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Can a defendant be convicted of aiding and abetting a principal when the only named principal, who must be an employee of the Government of the United States to have committed the substantive offense, has been acquitted by a jury of committing the substantive offense of which the aider and abettor is charged?

2. Does not the interpretation of the aider and abettor statute by the court below create a new substantive crime which Congress never intended by:

a). allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted;

b). eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting;

c). allowing the charge of the court below to eliminate from the consideration of

the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

Federal Statutes and Federal Issues Involved

26 U.S.C. §7214(a)(2) imposes a criminal sanction against:

"Any officer or employee of the United States acting in connection with any revenue law of the United States . . . (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty."

18 U.S.C. §2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

As hereinafter set forth, the courts of appeals for the District of Columbia, Second, Fourth, Seventh

and Ninth Circuits have held that where the only named principal has been acquitted by a jury of the substantive charge, a defendant cannot stand convicted of aiding and abetting the same defendant in the commission of the same substantive charge. The Court of Appeals for the Third Circuit has held to the contrary, and it is the conflict between these appellate decisions that should be resolved by your Honorable Court.

Statement

Cyril J. Niederberger, an employee of the Internal Revenue Service of the United States, was indicted for the substantive offense of violating 26 U.S.C. §7214(a)(2) in unlawfully and knowingly receiving a fee, compensation and reward which was not prescribed by law for the performance of his duties as an Internal Revenue agent. Three of the counts alleged the receipt of a golf trip at the Beachcomber Lodge and Villas in Pompano Beach, Florida; a golf trip at Miami, Florida at the Doral Country Club and a golf trip at the Seaview Country Club. Of these three substantive offenses, the jury acquitted Niederberger.

F. W. Standefer, an employee of Gulf Oil Corporation, was indicted on charges that he did aid and abet Cyril J. Niederberger in unlawfully and knowingly receiving a fee, compensation and reward which was not prescribed by law for the performance of his duties in three separate counts alleging the identical payments and golf trips set forth in the substantive offense against Niederberger and on which Niederberger has been acquitted.

Pretrial motions to dismiss these three counts of the indictment against Standefer were filed for the reason that if the only named principal -- Niederberger -- had been acquitted of receiving the very amounts of money and golf trips which are necessarily involved in 26 U.S.C. §7214 (a)(2), then Standefer cannot be guilty as an aider and abettor for if Niederberger did not commit the substantive offense, which only an Internal Revenue Service agent can commit, then Standefer, who was not an employee of the Government, could not be indicted as a principal or convicted as an aider and abettor. The court below denied the motions to dismiss the three counts of the nine-count indictment. The case proceeded to trial on all nine counts.

After the charge of the court, the jury deliberated and then inquired of the court:

> "Is intent to be considered in any of the nine counts?"

The court then charged that the statutes do not require a corrupt intention and, over objection of counsel, instructed the jury that whether the returns of Gulf Oil were correct or not is not relevant to their deliberations in the case.

The court instructed the jury that it was not necessary to show any agreement between the revenue agent and the aider and abettor and, in effect, told the jury that if the golf trips were paid for by Gulf at Standefer's authorization no specific intent was required, no criminal intent was required, and no agreement was required in order to convict the aider and abettor.

The jury returned a conviction on all nine counts. Post-trial motions were filed, which were denied by the trial court. An appeal was taken to the Court of Appeals for the Third Circuit, and argued before a three-judge panel. The three-judge panel affirmed the conviction in a two-judge per curiam opinion and a dissenting opinion by Judge Aldisert. A petition for rehearing by the court en banc was filed, which petition was granted and

the previous opinion of the court of appeals withdrawn. After the matter was argued before the court en banc, a five-judge majority of the court en banc affirmed the conviction and has held that even though the principal is found not guilty by a jury of committing the substantive offense, an aider and abettor can be convicted on the same facts. Two judges dissented from the conviction of all three counts on which the principal has been acquitted, one judge dissented from a conviction of one count on which the principal has been acquitted.

Your Honorable Court, as well as the District of Columbia, Second, Fourth, Seventh and Ninth Circuits have held that an aider and abettor cannot be convicted as an aider and abettor of an offense of which the only named principal has been acquitted. The Third Circuit establishes the view that the acquittal of a principal does not preclude the conviction of an aider and abettor of the only named principal. This decision is reached despite a clear expression by the above-named circuits and your Honorable Court that such a holding is illogical and not mandated by the aiding and abetting statute.

Reasons For Granting The Writ

This case presents an important issue as to the meaning of the aider and abettor statute in the administration of the criminal law of the United

States. 18 U.S.C. §2 is a criminal statute and should be strictly construed, not broadly construed. As stated in Viereck v. United States, 318 U.S. 236 at 241, 63 S.Ct. 561 at 563, 87 L.Ed. 734 at 738 (1943):

> "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority, and then only if punishment is authorized by Congress."

The aiding and abetting statute was amended in 1951. Prior to the amendment, the statute provided that one who "aids, abets, counsels, commands, induces or procures (the commission of an offense against the United States) is a principal". The 1951 amendment changed the last three words from "is a principal" to "is punishable as a principal". The legislative history of the amendment is short and states as follows, 1951 U.S. Code Congressional Service, p. 2583:

> "This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal

statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.

"Section 2(b) of title 18 is limited by the phrase 'which if directly performed by him would be an offense against the United States,' to persons capable of committing the specific offense. Section 2(a) of such title, while not containing that language, is open to the inference that it also is limited in application to persons who could commit the substantive offense. If regarded as a definitive section, the section makes the aider and abetter a 'principal'. It has been argued that one who is not a bank officer or employee cannot be a principal offender in violations of section 656 or 657 of title 18 and that, therefore, persons not bank officers or employees cannot be prosecuted as principals under section 2(a).

"Criminal statutes should be definite and certain."

In the instant case, the Internal Revenue Code proscribes certain conduct by employees of the United States. Niederberger was such an employee. Niederberger was indicted for accepting compensation in violation of the substantive offense and was acquitted on three counts. Standefer was indicted on the same three counts for providing to Niederberger

the same amounts of money as Niederberger was charged with receiving for the same golf trips at the same resorts. Standefer thus stands convicted of aiding and abetting Niederberger in the receipt of compensation violative of 28 U.S.C. §7214(a)(2) which a prior jury found Niederberger did not receive for that was the effect of their verdict of not guilty as to Niederberger.

Judge Sobeloff in United States v. Shuford, 454 F.2d 772, 779 (C.A. 4, 1971), held:

> ". . . As the indictment and the evidence at trial show, Jordan's involvement with the substantive crime charged was that of an aider and abettor of Shuford as principal. It is an accepted rule that where the only potential principal has been acquitted, no crime has been established and the conviction of an aider and abettor cannot be sustained. Shuttlesworth v. City of Birmingham, 373 U.S. 262, 83 S.Ct. 1130, 10 L.Ed.2d 335 (1963). This rule, undeviatingly followed for generations, would be offended if, on retrial, Shuford, the principal, should be acquitted and the conviction were allowed to stand as to Jordan, the aider and abettor. We therefore vacate Jordan's conviction on the substantive count under 18 U.S.C. §§2 and 1001, contingent upon Shuford's conviction, at his retrial, of the substantive offense charged." (Emphasis added)

See also United States v. Prince, 430 F.2d 1324 (C.A. 4, 1970), in which the court reversed the

conviction of the aider and abettor because while the appeal was pending the principal was acquitted. The court held:

> "His acquittal established that no crime has been committed."

In United States v. Smith, 478 F.2d 976 (D.C. C.A., 1973), the conviction of an aider and abettor was reversed because of prejudicial remarks at the trial directed at the alleged principal. The court stated that logically if the principal had been acquitted, the aider and abettor should also have been found not guilty so that in the interests of justice both convictions had to be reversed.

In United States v. Bernstein, 533 F.2d 775 at 799 (C.A. 2, 1976), in affirming a charge that the guilt of the aiders and abettors was conditioned on finding the principal guilty, the court held:

> "But it is the law that a person cannot be found guilty of aiding and abetting unless a principal whom he has aided and abetted committed the criminal act. See Shuttlesworth v. City of Birmingham, 373 U.S. 262, 83 S.Ct. 1130, 10 L.Ed. 2d 335 (1963); United States v. Hoffa, 349 F.2d 20, 40 (6th Cir. 1965), aff'd. 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966). But cf. United States v. Bryan, 483 F.2d 88, 93-94 (3d Cir. 1973) (not necessary that principal

> be tried and convicted or even identified); United States v. Provenzano, 334 F.2d 678, 691 (3d Cir.,), cert. denied, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed. 2d 544 (1964)."

In United States v. Hoffa, 349 F.2d 20, at page 40, (C.A. 6, 1965), aff'd., 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966), the court held:

> 'Before Hoffa could be convicted as an aider and abettor, however, it was necessary for the Government to prove that the principal, Medlin, committed the crime. Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265, 83 S.Ct. 1130, 10 L.Ed. 2d 335 (1963); Hendrix v. United States, 327 F.2d 971, 975 (C.A. 5, 1964); Edwards v. United States, 286 F.2d 681 (C.A. 5, 1960); Karrell v. United States, 181 F.2d 981 (C.A. 9, 1950)."

The majority opinion of the Court of Appeals for the Third Circuit sustaining the conviction cited United States v. Azadian, 436 F.2d 81 (C.A. 9, 1971), for the proposition that where a principal is acquitted because she was entrapped, the aider and abettor could nevertheless be indicted and convicted on the same offense. In that case, the Court of Appeals for the Ninth Circuit did not extend to the aider and abettor the principal's defense against entrapment. However, that case is

an entirely different proposition from a case where the substantive offense was submitted on its facts to a jury and the principal was acquitted on the facts, not on constitutional impediments. The Ninth Circuit would seem to be in accord with your Honorable Court and the District of Columbia, Second, Fourth and Seventh Circuits for in United States v. Jones, 425 F.2d 1048 at 1056 (C.A. 9, 1970), the court held:

> "There is no question but that there must be a guilty principal before there can be an aider and abettor."

The Ninth Circuit then cited Edwards V. United States, 286 F.2d 681 (C.A. 5, 1960). In United States v. Howitt, 55 F. Supp. 372 at 374; aff'd., 150 F.2d 82 (C.A. 5, 1945); aff'd., 328 U.S. 189, the district court held:

> "The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime."

The trial court also held that whether an aider and abettor can be convicted if the principal was acquitted was not before the court. United States v. Stevison, 471 F.2d 143 (C.A. 7, 1972), cert. den., puts that circuit in those which hold that a jury instruction not to convict an aider and abettor if the principal is not convicted is correct for an

aider and abettor cannot be convicted of aiding and abetting an acquitted principal.

The majority opinion of the Court of Appeals for the Third Circuit conjures reasons for not reaching the logical result that an aider and abettor cannot have aided and abetted an innocent principal. Those hypothetical issues are not raised by the facts of this case. In this case a jury verdict established the fact that Niederberger was not guilty of committing a substantive offense in receiving compensation from Standefer. Any definition of aid and abet requires the rendering of assistance, encouragement or support to another to commit a crime. See Funk & Wagnall's Standard College Dictionary, New Updated Edition, and Black's Law Dictionary, Fourth Edition. Thus, the very wording of the statute compels the requirements that a guilty principal -- that is, one who has not previously been acquitted -- be involved in the transaction before one can be guilty of aiding and abetting.

The doctrine of collateral estoppel precludes the Government of the United States from attempting to relitigate Niederberger's guilt as a principal on the very facts on which he has already been acquitted in order to establish the guilt

of Standefer in a subsequent trial as an aider and abettor. If Standefer and Niederberger were indicted together, the instructions to the jury set forth in United States v. Bernstein, supra, and United States v. Stevison, supra, would have compelled the court below to charge that if Niederberger were acquitted of any of the counts of which Standefer was charged with aiding and abetting, then Standefer could not be guilty of those counts. That the executive branch of the Government, through the Department of Justice, chose to indict Niederberger and try him first should not give the Government two bites at the apple. As stated by Mr. Justice Douglas in Sealfon v. United States, 332 U.S. 575, 68 S. Ct. 237 (1948):

> "The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict. Cf. DeSollar v. Hanscome, 158 U.S. 216, 222, 15 S.Ct. 816, 818, 39 L.Ed. 956. Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be

> convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only Greenberg but the Baron Corporation as well. Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.
>
> "So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical."

Also, in Ashe v. Swensen, 397 U.S. 446, 90 S.Ct. 1189 (1970), this Honorable Court held:

> " 'Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's

decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161. As Mr. Justice Holmes put the matter in that case, 'It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.' 242 U.S. at 87, 37 S.Ct. at 69. As a rule of federal law, therefore, '[i]t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain.' United States v. Kramer, 289 F.2d 909, 913."

Similarly, in United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68 (1916), Justice Holmes, writing for a unanimous Court, cited with approval Judge Hawkins' holding in Reg. v. Miles, L.R. 24 Q.B. Div. 423, 431, in which he held:

> "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings."

The conclusion of the court of appeals that the 1951 amendment to the aider and abettor statute abolishes the concept of aider and abettor and subjects a citizen to indictment as a principal where Congress changed the language of the Act from making an aider and abettor "a principal" to making a citizen "punishable as a principal" is a broad extension of a criminal statute beyond the rule of lenity usually applied to criminal statutes.

The confusion which will be engendered in the administration of criminal justice by allowing the court of appeals decision to stand is demonstrated by the fact that the court of appeals had previously held that the Government did not have to prove a specific intent or prove a quid pro quo in order to convict Niederberger. United States v. Niederberger, 580 F.2d 63 (C.A. 3, 1978), cert. den., 99 S.Ct. 567 (1979). Although the substantive offense does not require intent, aiding and abetting, counselling, commanding, inducing or procuring the commission of a substantive offense by definition of the words used would obligate the Government to prove a specific intent and agreement. The amendment of the statute by judicial fiat now requires no such agreement and no specific intent and

subjects Standefer to punishment for a crime not clearly defined by statute.

The majority of the facts introduced in the trial court involved Gulf Oil Corporation's audits and a special report titled the "Bahamas X Report" and an attempt by the Government to show that somehow the audits and the "Bahamas X Report" were related to the golf trips. Part of the defense involved the fact that since Gulf had paid some $150,000,000.00 in additional taxes because of the audits and Mr. Standefer was not involved in the "Bahamas X Report", these facts would bear on whether Standefer had a corrupt intent in providing the golf trips or if the golf trips were provided for business friendship as contended. The trial court has no discretion to take from a jury the defendant's theory of his defense on which a foundation is laid by the evidence. See United States v. Mitchell, 495 F.2d 285, 288 (C.A. 4, 1974); United States v. Leach, 427 F.2d 1107, 1112 (C.A. 1, 1970), cert. denied, 400 U.S. 829; Government of Virgin Islands v. Carmona, 422 F.2d 95, 99-100, n.6 (C.A. 3, 1970); United States v. Grimes, 413 F.2d 1376, 1378 (C.A. 7, 1969); Sparrow v. United States, 402 F.2d 826, 828 (C.A. 10, 1968); Bursten v. United States, 395 F.2d 976, 981 (C.A. 5, 1968), cert.

denied, 409 U.S. 843; Baker v. United States, 310 F.2d 924, 930 (C.A. 9, 1962), cert. denied, 372 U.S. 954; Levine v. United States, 261 F.2d 747, 748 (D.C. Cir. 1958); Marson v. United States, 203 F.2d 904, 912 (C.A. 6, 1953).

Finally, it is respectfully submitted that aiding and abetting requires the interaction of two persons in violation of the specific and strictly construed criminal statutes. If only one named person is a government employee and subject to indictment and conviction for the commission of a substantive offense, another defendant cannot be guilty of aiding and abetting the commission of the offense unless the principal is tried simultaneously or tried before the aider and abettor is convicted of the substantive offense. This would harmonize the decisional law applicable to aiding and abetting with the requirements that at least two defendants be convicted when a conspiracy is charged. See Morrison v. California, 291 U.S. 82, 92, 54 S.Ct. 281, 285 (1934), which held "conspiracy imports a corrupt agreement between not less than two ...."; Hartzel v. United States, 322 U.S. 680, 64 S.Ct. 1233 (1944); Bates v. United States, 323 U.S. 15, 65 S.C6. 15 (1944); dictum in United States v. Fox, 130 F.2d 56 (C.A. 3, 1942), cert. denied, 317 U.S.

666; Romontio v. United States, 400 F.2d 618 (C.A. 10, 1968); Lubin v. United States, 313 F.2d 419 (C.A. 9, 1963); United States v. Whitfield, 378 F. Supp. 184 (D.C. E.D. Pa., 1974), aff'd. without opinion, 515 F.2d 507 (C.A. 3, 1975). Aiding and abetting requires a guilty principal as much as a conspiracy requires at least two guilty conspirators.

Conclusion

As stated by Judge Aldisert, in his dissenting opinion, the conviction of Standefer violates the very foundation of criminal law --

> ". . . no one shall be punished for anything not expressly forbidden by law." (Appendix A, 40a)

He further stated:

> "My position is straightforward and blunt -- you cannot clap with one hand; it takes two to tango; to be guilty of aiding another to commit a crime there must first be a crime. I do not accept the convoluted rhetoric advanced by the government but adhere to the position I took in United States v. Bryan, . . . that a person cannot be convicted of aiding and abetting a principal when that principal has been acquitted of committing the charged offense." (Appendix A, 41a)

It is respectfully submitted that the majority opinion places an imprimatur of appellate approval on the presumption of guilt and the broad construction of criminal statutes rather than the presumption of innocence and the strict construction of criminal statutes.

With the proliferation of the use of the aider and abettor statutes by the Department of Justice and the divergence of interpretation exhibited by the Third Circuit as opposed to the District of Columbia, Second, Fourth, Seventh and Ninth Circuits, this important area of criminal law and the procedural and substantive extensions of the aiding and abetting statute should be resolved and made uniform by your Honorable Court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1909

UNITED STATES OF AMERICA

v.

F. W. STANDEFER,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Crim No. 77-00139-02

Argued December 12, 1978

Before ALDISERT, ADAMS and HIGGINBOTHAM, *Circuit Judges*

Reargued En Banc May 17, 1979

Before SEITZ, *Chief Judge* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, GARTH and HIGGINBOTHAM, *Circuit Judges*

(Opinion filed August 10, 1979)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

This case arises out of a series of substantial gifts made by the Gulf Oil Corporation and two of its officials to Cyril J. Niederberger, an agent of the Internal Revenue Service and the person charged with auditing Gulf's federal income tax returns. As a result of these alleged improprieties, separate indictments were filed against Gulf, Niederberger, and two Gulf employees, Joseph Fitzgerald and Fred W. Standefer. Standefer, the appellant here, was Gulf's Vice-President of Tax Administration, and Fitzgerald was his immediate subordinate.

Standefer was convicted on all nine counts of an indictment charging him with providing illegal gratuities to a public official, in violation of 18 U.S.C. § 201(f), and with aiding and abetting Niederberger in accepting fees, compensation or rewards, other than as permitted by law, for the performance of his duty, in violation of 26 U.S.C. § 7214(a)(2). Before a panel of this Court, Standefer unsuccessfully raised several challenges to his conviction. The court thereafter ordered rehearing *en banc* to consider one of these issues in particular: what effect, if any, should Niederberger's acquittal on three of the counts brought against him under § 7214(a)(2) have on Standefer's conviction for aiding and abetting Niederberger in committing the acts charged in those counts.

We conclude that the outcome of Niederberger's prosecution has no effect on Standefer's conviction, and accordingly affirm on all counts.

I. FACTS

From May, 1971, to June, 1974, Gulf Oil Corporation, through Standefer and Fitzgerald, supplied a number of gifts to Niederberger and his family. Five of these gifts were in the form of paid golfing vacations to various resorts

and became the subject matter of the indictments returned against Gulf, Standefer, Niederberger and Fitzgerald. Specifically, Gulf paid for: the hotel bill for the Niederberger family in Pompano Beach, Florida; a four-day trip at the Doral Country Club in Miami Beach; a four-day vacation at the Seaview Country Club in Absecon, New Jersey; a trip to Del Monte Lodge in Pebble Beach, California; and a four-day trip to the Desert Inn in Las Vegas, Nevada.

Gulf Oil pleaded guilty as to certain counts of the indictment against it, and Fitzgerald entered a plea of *nolo contendere.* Niederberger and Standefer elected to submit their cases to juries, and were tried separately. Niederberger, whose trial took place first, was charged with five counts of violating 18 U.S.C. § 201(g),[1] one for each of the trips listed above, and with five counts of violating 26 U.S.C. § 7214(a)(2),[2] also one for each of the trips in question. These statutes forbid the receipt by an IRS agent of gratuities in any way related to the performance of an official duty. Niederberger was convicted on four of the five § 201(g) counts, but a not-guilty verdict was returned as to the Pompano Beach trip. The jury found Niederberger guilty on only two of the § 7214(a)(2) counts, however, acquitting him on the counts that charged him with accepting the trips to Pompano Beach, Absecon and Miami. He was sentenced to six months in prison to be

1. 18 U.S.C. § 201(g) provides:

Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him.

. . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

2. 26 U.S.C. § 7214(a)(2) imposes a criminal sanction against:

Any officer or employee of the United States acting in connection with any revenue law of the United States—

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty.

followed by a five-year period of probation, and fined $5,000. On appeal to this Court his conviction was affirmed. *United States v. Niederberger,* 580 F.2d 63 (3d Cir. 1978), *cert. denied,* 99 S. Ct. 567 (1979).

Standefer was charged with four counts of violating 18 U.S.C. § 201(f),[3] a companion provision to § 201(g). Section 201(f) prohibits the giving or offering of gratuities to a public official for the performance of an official act. These four counts covered all the trips except that to Pompano Beach. Standefer was also charged with five counts of violating § 7214(a)(2), under the theory that he had aided and abetted Niederberger in accepting the five golfing trips. Although, on its face, § 7214(a)(2) applies only to government employees, such a charge is possible under federal law as a result of 18 U.S.C. § 2,[4] which allows the punishment of an aider and abettor as if he were a principal. The jury convicted Standefer on all nine counts. He was then sentenced to six months in prison, to be followed by a two-year period of probation, and fined $18,000—$2,000 on each count.

Standefer did not deny that he and Fitzgerald provided the trips in question to Niederberger or that they were paid for with Gulf Oil funds:

> Q. You have heard Mr. Fitzgerald testify that there were golf outings and you approved various

3. 18 U.S.C. § 201(f) provides:
Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;
Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

4. 18 U.S.C. § 2 reads:
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

> lunch, travel and expense vouchers. You heard that testimony?
> A. Yes, sir.
> Q. And that's true, is it not?
> A. Yes, siree.[5]

Thus, despite the refusal of the Niederberger jury to convict Niederberger on either of the Pompano Beach counts, Standefer conceded that he had arranged for payment for Niederberger's Pompano Beach trip:

> Q. Now let's take a look at these various dates called trip dates.
> Do you remember the incident involving Pompano?
> A. Yes, sir, I do.
> Q. Did you know that that trip was taking place before it took place?
> A. What I recall about that trip, Mr. Fitzgerald came into my office and he mentioned that he planned to be in Coral Gables on business, and at that time that he planned to take a vacation.
> He also mentioned—and this may have been a week or a few days before he left, and he mentioned to me that Mr. Niederberger planned to be there at the same time, and he said something to the effect that, "We will be getting together to play golf, we will be having dinner together," something along that line. You know, it wasn't a long, lengthy discussion or anything heavy and so I said, "Well, Fitz, if you are doing that, why don't you pick up Mr. Niederberger's expenses?"[6]

Similarly, although the Niederberger jury had returned a not guilty verdict on the § 7214(a)(2) counts regarding Miami Beach and Absecon, Standefer also admitted arranging for these gifts.[7]

5. App. 838a.
6. App. 860a-861a.
7. App. 863a-865a (Miami); App. 869a-872a (Absecon).

Standefer, therefore, did not premise his defense on a denial of the facts that formed the basis of the government charges. Rather, he contended that the gifts were provided as a matter of friendship, and had no relationship to Niederberger's official duties. But here, too, the defense faced a difficult task. As this Court made clear in *United States v. Niederberger,* neither of the statutes involved in that case obligate the government to prove a specific intent, nor do they require proof of a *quid pro quo*.[8] Standefer, for all practical purposes,[9] confronted the same statutes. To find Standefer guilty here, then, it was not necessary for the jury to find a specific intent on Standefer's part to bribe Niederberger, nor did it need to find that Standefer or Gulf were in any way benefited by actions taken by Niederberger. All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes.

The jury's determination in this regard finds substantial support in the record. Although Standefer argued that the trips were given for reasons of friendship, there is no evidence that he ever provided trips for Niederberger prior to his becoming the IRS case manager for the Gulf account or that he has done so since Niederberger left that position. Nor does anything in the record show that Standefer was as generous with corporate funds in giving gifts to any non-business related friends.[10] And it appears that Standefer had no social relationship with Nieder-

8. 580 F.2d at 69. *Accord,* United States v. Irwin, 354 F.2d 192 (2d Cir. 1965), *cert. denied* 383 U.S. 967 (1966). 18 U.S.C. § 201(f) may be contrasted with 18 U.S.C. § 201(b), which requires a specific intent to bribe a public official. The penalty for violation of § 201(b) is a fine of up to $20,000 (or three times the amount of the bribe, whichever is greater) or a prison term of up to fifteen years, or both, and possible disqualification from future office. In contrast, the penalty for violation of § 201(f), under which Standefer has been convicted, is a fine of up to $10,000 or a prison term of two years, or both. *See* 18 U.S.C. § 201.

9. Niederberger, of course, was charged with violating § 201(g), not § 201(f). The sections are companion provisions, however, and do not vary in regard to the intent required or the need to demonstrate a *quid pro quo.*

10. *See, e.g.,* App. 688a-694a; App. 775a-776a; Supp. App. 42b-45b.

berger, other than the contact he had with him in their various official capacities.[11] Moreover, Standefer's immediate subordinate, and own witness, Fitzgerald, testified that he did not believe Standefer and Niederberger to be "close personal friends," but that he considered them to be only "business friends."[12] Standefer also regularly submitted, as he was required to do, representation letters to his superiors wherein he stated that all expenditures made or authorized by him, such as the payments for the Niederberger trips, were in the ordinary course of Gulf's business, and that there was an "expectation that Gulf (would) benefit directly or indirectly" from such expenditures.[13] Most tellingly, Standefer himself, at one point, stated that the purpose of his expenditures was "to establish rapport" with the IRS:

> Q. What did you understand your duties to be in connection with the policies of Gulf Oil as to IRS agents?
>
> A. Well, it was—My understanding is that I was to develop a rapport; and as a matter of fact, and when I first came into Pittsburgh, I had not made this arrangement, but within a month there was a joint party between the Gulf people and the IRS; and even though we were having all the friction at that point, I observed that it seemed that the people could get out on the golf course and realize that maybe the other ones weren't—didn't have horns, and it seemed to improve communications and rapport.
>
> Q. Did you continue that policy?
>
> A. Yes, sir, I did.
>
> . . . .
>
> Q. What did you consider those expenditures [the vacations provided to Niederberger by Gulf] to be, sir?

11. App. 207a-209a.

12. App. 687a.

13. Supp. App. 124b-125b; Supp. App. 157b-158b.

> A. It was to establish a rapport to relieve tension that built up on one of these big audits. No one can imagine how difficult these audits are, both on the IRS as well as Gulf. It is a terrible, terrible procedure to go through.[14]

Accordingly, there was ample, perhaps even overwhelming, evidence in the record to support the jury's finding that the gifts Standefer made to Niederberger were not provided solely for social reasons.

On appeal to this Court Standefer has urged, *inter alia,* that three of the § 7214(a)(2) counts—those based on the trips to Pompano Beach, Miami, and Absecon—should have been dismissed because of Niederberger's acquittal on practically identical charges. Specifically, Standefer argues that as a matter of law he cannot be convicted of aiding and abetting a principal when that principal has been acquitted of committing the charged offense. A divided panel rejected this argument, relying on past decisions of this Court that have permitted the conviction of an aider and abettor even when the principal has been acquitted. *See United States v. Bryan,* 483 F.2d 88 (3d Cir. 1973) (en banc); *United States v. Provenzano,* 334 F.2d 678, 691 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964); *United States v. Klass,* 166 F.2d 373 (3d Cir. 1948). The Court ordered rehearing *en banc* in order to reconsider its position in these cases and to re-examine the law in this area.

II. The Status of Aiders and Abettors Under Federal Law

The primary issue facing the Court at this juncture, and the one that the Court *en banc* requested counsel to address, is whether an aider and abettor may be convicted notwithstanding the acquittal of the principal he is charged with aiding and abetting.

At common law, the prevailing rule was that an accessory to a crime could not be convicted unless and until

14. App. 837a-838a.

the principal whom he had assisted had been convicted of committing the substantive offense.[15] If the principal were to escape, or to die, or never brought to trial, or tried and acquitted, no charges could be brought against any accessories charged with assisting him. Federal law, of course, has no common law crimes, and until 1909 an accessory to a felony could not be tried at all absent an express statutory authorization making the aiding of the principal committing that crime a crime in and of itself.[16] A nineteenth century federal prosecution for aiding and abetting thus required a specific "accessory provision," and several such provisions were included among the criminal statutes of the period.[17] In 1909, however, Congress altered this system by enacting a general rule:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.[18]

It has long been the position of most courts and commentators that, as the Court of Appeals for the Ninth Circuit put it four years after the statute was passed:

> The effect of the section under consideration is to abolish the distinction between principals and accessories in offenses defined in the laws of the United States, . . . the section under consideration is a recognition by Congress that the old distinction between principals and accessories which pertained to felonies

15. The prevailing rule, it should be noted, was not uncritically or universally accepted. *See, e.g.,* Regina v. Wallis, 1 Salk. 334, 91 Eng. Rep. 294 (1703).

16. The rule as to misdemeanors differed, however. No specific statutory authorization was necessary to prosecute an accomplice, and aiders and abettors were chargeable as principals. *See* United States v. Mills, 32 U.S. (7 Pet.) 138, 141 (1833).

17. *See, e.g.,* Act of March 3, 1825, ch. 64, § 45, 4 Stat. 114 (buying stolen mail); R.S. § 5323 (1878) (privacy); R.S. § 5427 (1878) (naturalization offenses); R.S. § 5466 (1878) (destroying mail).

18. Act of March 4, 1909, ch. 321, 35 Stat. 1152. This provision became § 332 of the penal code, and is presently codified, with some modifications, at 18 U.S.C. § 2(a).

> is generally abrogated, and that a charge against one formerly known as an accessory is good against him as a principal.[19]

This statute, which is now codified, with some changes, at 18 U.S.C. § 2(a), rejects any distinction between a principal and an aider and abettor. Consequently, the issue presented here is more accurately phrased in terms of whether a jury's finding as to one "principal" should affect the outcome of charges brought against another "principal" involved in the same crime—that is, whether the doctrine of non-mutual collateral estoppel does or should prevail at federal criminal law. But before this issue is considered, it is necessary to discuss certain questions that have arisen in regard to the meaning of 18 U.S.C. § 2, despite the general acceptance accorded the interpretation set out above.

A. *The Congressional Intent in Drafting 18 U.S.C. § 2.*

A critical question raised in the course of the Court's *en banc* consideration of this case is whether the original aider and abettor statute of 1909 was intended by its drafters to be as broad as this and other courts have assumed over the last seventy years. In particular, the claim has been made, in Part IV A of the concurring and dissenting opinion by Judge Aldisert, *infra*, that Congress never anticipated the use of 18 U.S.C. § 2 to allow the conviction of an aider and abettor after the principal has been acquitted.

This contention is premised on the absence of any expression of an affirmative intent on the part of Congress to bring about such a result. Implicit in such an argument is the concession that the *language* of the statute states a general rule encompassing the facts of any aider and abet-

19. Rooney v. United States, 203 F. 928, 932 (9th Cir. 1913). This view has been adopted by the majority of the courts of appeals, *see* cases gathered in note 31, *infra*. It is also the view taken by the Model Penal Code, Section 2.06(7).

tor case, including one where the principal has been acquitted. Despite this concession, the argument seeks to exonerate Standefer by stressing that nowhere in the legislative history did Congress unequivocally state its desire to permit the conviction of an aider and abettor once a principal has been acquitted. The solitary support for this argument is one passage of the legislative history. In the Senate Report on the Act of March 4, 1909, a Senate committee expressed its view regarding the purpose of the proposed legislation:

> The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.
>
> At common law an accessory cannot be tried without his consent before the conviction or outlawry of the principal except where the principal and the accessory are tried together; if the principal could not be found or if he had been indicted and refused to plead, had been pardoned or dies before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible.[20]

Although the Senate Committee did not, in either the quoted passage or elsewhere, express an intention to make any exception to the general rule announced in the statute itself, namely that an aider and abettor is to be treated as a principal, it is asserted that the Senate, at least, envisioned reaching only certain "obstacles to justice" which are clearly set out in the Committee's notes. The argument proceeds that inasmuch as the situation at issue in this case—where the principal has been acquitted—is one of the more obvious possibilities that might arise in aider and abettor cases and is not adverted to in the report, a doubt

20. S. Rep. No. 10, pt. 1, 60th Cong., 1st Sess. 26 (1908),
We note that neither Standefer nor the government has adverted to this Senate Report at any time in the course of this case, either before the district court, or before the original panel of this Court, or before the Court sitting *en banc*.

arises whether the prior law was intended to be altered in this regard. Such a doubt, it is then asserted, must, under traditional rules of statutory construction, be resolved in favor of a criminal defendant and against the government.

We are unpersuaded that this approach yields a proper interpretation of 18 U.S.C. § 2(a). The limited exception contended for by our colleagues does not appear in the language of the statute nor is it at any time specifically endorsed in the legislative history. Further, in the more than seventy years since the passage of the statute no court or commentator has ever suggested, even in passing, that the Congress sought to create or retain such a remnant of the common law rule. The entire argument is premised on the fact that a committee did not affirmatively set down, in a particular report, its intention to reach this precise class of cases.

It is true that the Supreme Court has recently employed a somewhat analogous formulation in requiring an affirmative expression of intent from Congress before it would read the facially applicable National Labor Relations Act to include in its scope parochial school teachers.[21] But that opinion, as well as the approach employed therein, was expressly motivated by the salutary and longstanding rule that a court is obligated, wherever possible, to avoid a construction that might raise a constitutional issue. *See, e.g., The Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). Even so, the parochial school decision drew a sharp dissent from four Justices who were unwilling to allow the absence of an affirmative expression of intent in the legislative history to alter the clear language of the statute,[22]

21. *National Labor Relations Board v. The Catholic Bishop of Chicago,* 47 U.S.L.W. 4283 (March 21, 1979).

22. The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. *Ante,* at 14. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments.

47 U.S.L.W. 4283, 4288 (Brennan, J., dissenting).

even when a constitutional issue is implicated. In cases such as this one, where no constitutional concern is present, the insistence on such an affirmative expression of intent in the course of legislative hearings or in the body of a legislative report would more likely have the effect of undermining congressional authority rather than respecting Congress' desires.

The Act of March 4, 1909 is clear on its face. Both those who commit crimes and those who aid and abet their commission are placed in a single class: "principals." The statutory language does not admit to any other possibility, for the transformation from the common law rule appears to be both general and complete, there being no exceptions provided for in the statute itself. It is undeniable, of course, that courts no longer exclude evidence of the legislature's intent on the ground that the meaning of the words of a statute is plain. But neither do courts, in seeking to ascertain the purpose of a piece of legislation, disregard the words chosen by the legislature. "Illogical though it was to hold that a 'plain meaning' shut off access to the very materials that might show it not to have been plain at all, it was equally wrong to deny the natural meaning of language its proper primacy; . . ."[23] Here the words chosen by the Congress express a general rule. Equally important, however, the legislative history itself announces a desire for general application. The very Senate Report that is relied upon to raise the question of legislative intent states unequivocally that the relevant section, along with another covering accessories after the fact, "are new only in the sense that they are made general in their application. They explain themselves."[24]

Moreover, even as to the passage giving reasons for the change, set forth in full *supra,* there is no explicit intention expressed to create the exception contended for in Standefer's behalf. Although the Senate Report lists the elimination of certain "obstacles to justice" in support of

23. H. Friendly, Benchmarks 206 (1967).

24. S. Rep. No. 10, pt. 1, 60th Cong. 1st Sess. 26 (1908).

the proposed statute, there is absolutely no indication that the list purported to be all inclusive. In fact, such an assumption would, in effect, apply the canon of statutory interpretation known as *expressio unius, exclusio alterius* not to the words of the statute but to the language employed in a committee report.[25] Our attention has been called to no instance where this approach to statutory construction has been applied; indeed, many general Congressional enactments would be seriously limited by such an interpretation. In proposing general rules congressional committees need not be expected to anticipate every possible application of the contemplated rule, nor to voice their desire to bring about all the applications they do foresee. An insistence on an affirmative expression of intent would require just such a clairvoyant legislative report and would bring many general enactments under scrutiny. Such a demanding reading of legislative history is not, in our view, in the best interests of the legislative process.

It also bears emphasizing that the statute at issue is now over seventy years old and at no time in the period since its enactment has any court or commentator adverted to this Senate Report to demonstrate that Congress' intent was being ignored. Moreover, on several occasions since 1909 Congress has had the opportunity to reform the criminal code, and, indeed, is in the process of doing so now. Yet, it has never sought to alter 18 U.S.C. § 2 to create the exception it is claimed to have had in mind in 1909; and

25. Another less drastic approach would be to apply a different canon of statutory interpretation, *ejusdem generis*, to the words of the Senate Report. Under this doctrine, once a statute lists items of one type, any other items are to be included only if they are of the same type. Thus the list of "obstacles to justice" found in the Senate Report would not necessarily be all inclusive, since other "obstacles to justice" not included therein would be deemed within the legislative intent. But the application of *ejusdem generis* to legislative history, rather than the statute itself, is as unprecedented as the application of *expressio unius, exclusio alterius* would be. Moreover, the Senate Report contains no words of inclusion, such as "and other such obstacles" which are usually necessary to invoke *ejusdem generis* rather than *expressio unius, exclusio alterius*—even assuming that canons of statutory interpretation may be applied to legislative history. Finally, even if *ejusdem generis* were applicable, the question would remain whether an outright bar to prosecution of an aider and abettor after the principal is acquitted may properly be described as an "obstacle to justice."

this despite several cases in the federal courts giving the statute its natural meaning. Although at times it may be proper to reconsider an interpretation of a statute in light of new evidence of congressional intent, we believe that long standing interpretations of statutory language and purpose should not be lightly overturned if the law is to have any certainty and consistency.

In sum, we are not persuaded that an objective reading of the statute and its legislative history can be said to leave a doubt as to the general nature of the rule clearly enunciated therein. There is thus no basis for construing such a doubt in Standefer's favor. As Mr. Justice Frankfurter noted in *Callanan v. United States,* 364 U.S. 587 (1961):

> Petitioner invokes 'the rule of lenity' for decision in this case. But that rule, as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beg one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.[26]

We thus reject the view that the Senate Report may be construed to raise a doubt about the general nature of the rule set out in 18 U.S.C. § 2(a).

B. *The application of 18 U.S.C. § 2 to convict one who could not be charged as a principal under the substantive criminal statute.*

A second concern that has been expressed is that the substantive criminal statute under which Standefer was indicted, 26 U.S.C. § 7214(a)(2), is limited in its coverage to officers and employees of the United States. Standefer,

26. 364 U.S. at 596.

a private citizen, notes that the government employed 18 U.S.C. § 2(a) to prosecute him as an aider and abettor, when he could not have been indicted as a principal for the substantive crime. He questions whether Congress anticipated that a statute that ostensibly does no more than alter a prior system of classification would be used to expand the reach of other substantive criminal statutes that are confined to certain classes of defendants by their terms. "Congress could not have intended to amend 26 U.S.C. § 7214(a)(2) to apply to a non-Revenue Service citizen," he asserts. "The substantive offense contained in § 7214 (a)(2)," the argument continues, "must be committed by an employee of the Internal Revenue Service."[27]

This point might be somewhat convincing were it not for the 1951 amendment of the Act. But apparently the very question Standefer raised in this regard had arisen prior to 1951, because the Congress, in Section 17B of the Act of October 31, 1951, altered the language of the statute by replacing "is a principal" with "is punishable as a principal." The change was not designed to be purely formal, for Congress expressed its purpose quite clearly:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.[28]

In light of this unambiguous statement by Congress that 18 U.S.C. § 2(a) may be used to reach one who could not be indicted as a principal, Standefer, despite his private status, may not be heard to challenge his conviction on this

27. Brief for appellant sur rehearing en banc, at 22.

28. S. Rep. No. 1070, 82nd Cong. 1st Sess., (*reprinted in* (1951)) U.S. Code Cong. & Admin. Serv. 2578 at 2583.

ground. Section 7214(a)(2) is made applicable to Standefer through 18 U.S.C. § 2(a), and he must therefore be judged, in the circumstances of this case, as though he were a principal capable of violating that statute.

C. *Precedents Bearing on the Question Whether an Aider and Abettor May be Convicted When a Principal has been Acquitted.*

It is clear that 18 U.S.C. § 2(a) was designed to abolish the common law requirement that any action taken against an aider and abettor is to be conditioned on the prior conviction of the principal. Although there is general agreement that most elements of this absolute dependency have been abrogated,[29] the idea of allowing the conviction of an aider and abettor when a principal has actually been acquitted still evokes some dissent. At least one court of appeals has persisted in applying the traditional common law bar in such a situation, despite the passage of 18 U.S.C. § 2(a).[30] The clear majority position,[31] however, is the view taken by the Model Penal Code [32]—namely that no such bar exists.[33]

29. No modern court, to our knowledge, has taken the position that an aider and abettor may not be convicted if the principal is for whatever reason never brought to trial. The conviction of a principal is thus no longer a prerequisite to the conviction of an aider and abettor in any jurisdiction of which we are aware.

30. United States v. Shuford, 454 F.2d 772 (4th Cir. 1971); United States v. Prince, 430 F.2d 1324 (4th Cir. 1970).

31. *See, e.g.*, United States v. Deutsch, 451 F.2d 98, 118-19 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); United States v. Bryan, 483 F.2d 88 (3d Cir. 1973) (en banc); United States v. Musgrave, 483 F.2d 327, 331-32 (5th Cir. 1973); United States v. Kelly, 258 F. 392, 402 (6th Cir.), *cert. denied*, 249 U.S. 616 (1919); Pigman v. United States, 407 F.2d 237 (8th Cir. 1969); United States v. Azadian, 436 F.2d 81 (9th Cir. 1971); United States v. Coppola, 526 F.2d 764, 776 (10th Cir. 1975); Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958).

32. An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, *though the person claimed to have committed the offense* has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or *has been acquitted.*

Model Penal Code, Section 2.06(7) (emphasis added).

This view is also favored by most commentators. *See Perkins, Criminal Law*, ch. 6, § 8 (1969); 1 *Wharton's Criminal Law and Procedure*, § 116 (1957); 21 Am. Jur. 2d, Crim. Law, § 128 (1965).

33. A scattering of cases may be said to take an ambivalent view or to be susceptible to varying interpretations. *See, e.g.*, United States v. Bernstein,

Most, if not all, of the cases urged by Standefer on this point in fact stand for little more than the abiding requirement that the government must prove every element of its case in order to sustain a conviction. This is true of any criminal prosecution, but it has been a particularly notable factor in the reversal of several convictions of aiders and abettors when the government has been unable to establish adequately the commission of the criminal act by the principal. 18 U.S.C. § 2 has not altered the rule that in order to convict an aider and abettor, the govern-

33. (Cont'd.)
533 F.2d 775, 799 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976); United States v. Smith, 478 F.2d 976 (D.C. Cir. 1973); United States v. Stevison, 471 F.2d 143 (7th Cir. 1972), *cert. denied*, 414 U.S. 819 (1973).

In the *Bernstein* and *Stevison* cases, both involving situations where the principal and the aider and abettor were tried together, the issue was whether it was error for the trial judge to charge the jury that it could not find the aider and abettor guilty without first finding the appellant principal guilty of committing the substantive crime. The challenges were made by principals who contended that such a charge prejudiced them by leading the jury to conclude that it could not convict certain defendants, for whom it may have had little sympathy, without convicting the appellants, for whom it may have had some. In *Stevison*, for instance, the principal's defense had been based on coercion by the aider and abettor and she reasoned on appeal that the jury might well have acquitted her had it been permitted to convict her co-defendant aider and abettor independently.

In both cases the appellate courts rejected the argument tendered by the principals, citing in one case *Shuttlesworth*, and in the other *Giragosian*, both of which are discussed in the text *infra*. The cases would thus appear to stand for no more than the proposition that "a person cannot be found guilty of aiding and abetting unless the principal whom he has aided and abetted committed the criminal act." *Bernstein, supra*, 533 F.2d at 799. These cases might be susceptible to a broader reading, however, because of certain citations and language used. Thus in *Bernstein* the Second Circuit indicated that it believed its rule was contrary to that announced by this Court in *Bryan* and *Provenzano, supra*. (*But see* United States v. Deutsch, 451 F.2d 98, 118-19 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972)) (which is in apparent agreement with *Bryan* and *Provenzano*). And in *Stevison* the Court stated: "The presupposition that an aider and abettor may be convicted, since 1951, absent conviction of the principal is invalid." 471 F.2d at 148. Were this language to be given its broadest reading, it would state the common law rule that forbids the conviction of an aider and abettor altogether unless the principal is also convicted, even in cases where the principal died or was not tried. Inasmuch as this is plaintly not the law after 18 U.S.C. § 2, we do not think that the court intended so broad a statement, or to go beyond the cases cited in support of its holding.

The third arguably ambivalent case, *Smith*, also involved defendants who were tried together. The conviction of the principal, Smith, was overturned because the prosecutor threatened a witness, ultimately depriving both defendants of his testimony. The case appears to stand for the proposition that "error that damaged Smith's defense was also prejudicial to Jarvis," the aider and abettor, thus requiring the reversal of both verdicts. The opinion does not therefore appear to signal a rejection by that court of the position it took in Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958).

ment must first demonstrate that a crime has been committed. *See, e.g., United States v. Cades*, 495 F.2d 1166, 1167 (3d Cir. 1974).

Thus in *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963), two ministers charged with aiding protesting students in conducting a "sit-down demonstration" were held not to be subject to conviction on an aiding and abetting charge when the "sit-down demonstration" itself was held not to be criminal under the federal Constitution. The act that they had helped to bring about was simply not a criminal act. In the present case, however, there is no suggestion that the acts charged, if proven, are insufficient to constitute criminal offenses.

A different but perhaps more typical example is *Giragosian v. United States*, 349 F.2d 166 (1st Cir. 1965). In that case the court concluded that there was ample evidence to support the jury finding that Giragosian had aided and abetted a bank official named Page in the misapplication of bank funds—if such an offense could itself be proved. But the court held that the evidence of the actual commission of the substantive offense by Page, the principal, was insufficient to support a guilty verdict, inasmuch as there was no showing of the willfulness necessary to convict Page under the applicable statute. If the government could not prove that there was a substantive criminal violation, it could not secure a verdict against one charged with aiding and abetting that violation.[34]

Giragosian and cases like it, it should be added, are not themselves universally accepted. Even when the principal and the aider and abettor are tried together, whether by judge or by jury, a conviction of the aider and abettor may be sustained even if the fact finder concludes that the principal lacked the requisite intent to commit the substantive crime, provided that the act constituting the crime has itself been completed. This has been the rule in this Circuit. *United States v. Bryan*, 484 F.2d 88 (3d Cir. 1973) (en banc). *Bryan* involved an "innocent dupe" who was

34. *Accord* United States v. Hoffa, 349 F.2d 20, 40 (6th Cir. 1965).

charged as a principal in the theft of 950 cases of Scotch whiskey. The dupe, Echols, was acquitted because a reasonable doubt existed whether he had the requisite intent to steal the whiskey. No such doubt existed as to Bryan, the aider and abettor, and he was convicted by the same fact finder that acquitted Echols. Although a question was therefore raised whether the commission of the substantive crime charged in the indictment had been proved, *see* 484 F.2d at 97-99 (Gibbons, *Circuit Judge,* dissenting), a majority of this Court allowed the conviction to stand. That case, in fact, appears to present the situation contemplated by 18 U.S.C. § 2(b).

But the collective teachings of *Shuttlesworth, Giragosian, Bryan,* and cases like them, when applied to the case *sub judice,* do not offer much help to Standefer. The crime charged here is not constitutionally protected or otherwise innocent activity as was the case in *Shuttlesworth.* Moreover, the theoretical difficulties presented by *Bryan* and *Giragosian* are not present here, where the evidence offered by the government to prove the commission of the substantive crime was more than adequate. In *Bryan* the evidence established that the named principal did not commit the substantive offense. In *Giragosian* the evidence was insufficient as a matter of law to permit a jury to find that the substantive offense was in fact completed. Here, in contrast, the evidence produced at Standefer's trial left little doubt that the substantive crime was committed, and by Niederberger. Standefer himself admitted that all the vacations listed in the indictment were provided to Niederberger and paid for by Gulf,[35] and the record clearly sup-

35. *See* text accompanying notes 5-7.

We cannot agree, however, with the position taken by Judge Aldisert in Part III of his concurring and dissenting opinion to the effect that "it is precisely because" of Standefer's admissions that "Niederberger's acquittal can only be interpreted as a jury finding that receipt of the vacations in question was an innocent act." Standefer's admissions were not made until his own trial, well after Niederberger had been convicted. Standefer made no admissions—indeed he did not testify—at Niederberger's trial. Thus whatever interpretation one may choose to give the findings of the Niederberger jury—if indeed it is appropriate to interpret them at all—such an interpretation ought not to be based on statements made by Standefer long after the Niederberger jury delivered its verdict.

ported a finding of the requisite business relationship.[36] Accordingly, Standefer can find no comfort in those precedents requiring adequate proof of the fact of a substantive criminal act. He must prevail, if at all, on the theory that the previous determination of the Niederberger jury is in some way binding on his own jury.

D. *The Justification for Permitting the Conviction of an Aider and Abettor When the Principal has been Acquitted.*

As we have suggested above, the rule that one jury's determination as to a principal forecloses a second jury's determination as to an aider and abettor—as opposed to the rule requiring proof of the commission of a criminal act—is endorsed by only one court of appeals. In *United States v. Prince,* 430 F.2d 1324 (4th Cir. 1970), the Fourth Circuit concluded that the acquittal of Prince's hunting companion on a charge of shooting a rail bird from a motorboat conclusively established that no crime had been committed, and therefore required reversal of Prince's separate conviction for aiding and abetting his friend by operating the motorboat. Were we to apply *Prince* to the present case, we would have to conclude that Niederberger's acquittal on three of the § 7214(a)(2) charges establishes as a matter of law that no substantive crime was committed as to the offenses charged in those counts, and thus bars a contrary finding by the Standefer jury.

The superficial attractiveness of this approach is readily apparent. The problem of allowing two seemingly inconsistent verdicts to survive is naturally troubling, and a rule of law that eliminates such apparently contradictory results is, therefore, not without appeal. Moreover, in the criminal context, the government's success in securing a guilty verdict against an aider and abettor after failing to secure such a verdict against a principal may strike some

36. *See* text accompanying notes 8-14.

as giving the prosecution "two bites at the apple" and therefore as bordering on unfairness.

But even if it is easy to understand the temptation to retain at least this one aspect of the common law rule, we do not believe that Congress has done so,[37] and the reasons for not doing so are, on balance, persuasive. First, as a logical matter, the barring of the prosecution of an aider and abettor when the principal is acquitted would at times spawn its own inconsistencies. An example may be drawn from the present case. Were it beyond question, for instance, that the Niederberger jury must have entertained a doubt that Gulf Oil money was used to pay Niederberger's hotel bill, in Pompano Beach—the one vacation for which Niederberger was not convicted under any statute—we would be required to accept as a fact an arguable jury conclusion that all the parties now before us concede to be false.[38]

Nor do we believe that this type of conundrum would be all that unusual in cases where aiders and abettors are tried separately from the principals that committed the crime. It will surely come as no surprise that in many cases the proof available to the government may vary depending on who is being prosecuted and when the prosecution is brought. Evidence inadmissible against one defendant may often be used against another. For example, differing defense strategies may result in different rulings

37. As is elaborated upon in our discussion of the original purpose of 18 U.S.C. § 2, *see* part IIA *supra*, it is our view that that statute states a general rule abrogating in its entirety the common law distinction between principal and accessory before the fact. Of course, an aider and abettor is not deprived of the benefit of other rules of law, applicable to all principals, if such rules offer him protection. *See* Part III *infra*.

38. This hypothetical example is given only as an illustration. In fact, several inferences might be drawn from the verdict rendered by the Niederberger jury. We cannot say with any certainty what may have motivated its apparently contradictory conclusions. Its verdict may be read to indicate doubt as to certain facts, or confusion on legal standards or have been the result of compromise or compassion. Whatever may have been at the root of the Niederberger jury's conclusions, we do not believe that the district court trying Standefer was required to seek to rationalize that result or that it was or should have been controlling on the considerations of the Standefer jury.

on admissibility under the Federal Rules of Evidence [39] or, as was the case here, different witnesses and different emphasis in testimony. Similarly, one defendant may lack standing to challenge the admissibility of evidence unconstitutionally obtained from a co-defendant, and therefore inadmissible against the co-defendant but admissible against him.[40] And if there is a substantial time difference between the trials of the defendants, a key witness at the first trial may die or be missing at the time of the second trial, or conversely, new evidence may be obtained against the second defendant that was either unknown or unavailable to the prosecution at the time of the first trial.[41] In short, it may not comport with the realities of criminal trials to require two juries who are presented with different records to reach the same conclusion. To insist upon an absolute congruence of results would leave many courts in the uncomfortable position of reversing findings of fact supported by overwhelming evidence because a different fact finder entertained a reasonable doubt when confronted with a much less extensive or persuasive record.

Just as logic does not dictate such a result, neither does fairness. Despite any assumption to the contrary, the government does not get "two bites at the apple" under the majority rule set forth in the Model Penal Code. The defendant, however, does get such an advantage under the modified common law rule that is urged upon us here. The

39. Very often a defendant's decision to testify will present opportunities to the government to offer evidence that might not otherwise be admissible. Should a defendant make a general denial of bribe-taking, for instance, the prosecution may succeed, by way of rebuttal, in introducing evidence of bribes other than those charged in the indictment. Such evidence of prior bad acts would normally be excluded under Fed. R. Evid. 404(b).

40. Thus, a defendant normally has standing to raise violations of his own constitutional rights, but no standing to raise those of others. Alderman v. United States, 394 U.S. 165, 171-72 (1969). In certain cases, then, unconstitutionally seized evidence may be admissible against a defendant who had no possessory or privacy interest in the place searched or the goods seized, but not against another who had such an interest. *See, e.g.,* Brown v. United States, 411 U.S. 223 (1973). *Cf.* United States v. Azadian, 436 F.2d 81 (9th Cir. 1971) (defendant's entrapment defense not vicariously available to co-defendant who was not entrapped).

41. This latter possibility was the case in *United States v. Musgrave*, 483 F.2d 327 (5th Cir. 1973).

double jeopardy clause of the federal constitution prohibits the government from retrying a defendant after he has been acquitted, and thus makes "two bites" at the same apple impossible. A rule forbidding the prosecution of an aider and abettor once a principal is acquitted, on the other hand, would allow the aider and abettor the opportunity to prevail in either one of two trials. No matter how strong the evidence against him at his own trial, he could always hope to be acquitted vicariously as a result of some fortuitous development at the principal's trial. Of course, the government cannot benefit from any developments at the other trial, and the suggestion that the defendant at the second trial might therefore be properly convicted vicariously as a result of the findings of a different fact finder would be universally rejected out of hand. The aider and abettor is thus provided with a second trial, at which he is not put in jeopardy, and from which he can only benefit.

But even if this "windfall" aspect of the common law rule is considered tolerable, the application of a bar to conviction in these cases would cause many guilty defendants to go free without serving any countervailing purpose. For instance, in *United States v. Azadian,* 436 F.2d 81 (9th Cir. 1971), the principal, a Miss Daniel, was acquitted of charges of soliciting or receiving bribes in return for altering selective service classifications. Her conviction was impermissible because the government had entrapped her through the use of an agent. The government, however, had not entrapped her accomplice Azadian, who was indicted as an aider and abettor because he was a private citizen and could not be indicted on the substantive statute that applied only to government officials. The Court of Appeals for the Ninth Circuit saw no reason to extend to him Miss Daniel's constitutional protection against entrapment when Azadian himself was clearly not entrapped.

Similarly, in *United States v. Musgrave,* 483 F.2d 327 (5th Cir. 1973), the government's evidence against the principal, one Bryant, was insufficient to convict him at his trial

and he was acquitted. Thereafter, new evidence was uncovered which could have allowed a jury to convict Bryant of the charged offense—bank fraud. Although it was unable to proceed against Bryant because of the fifth amendment's double jeopardy bar, the government did secure the conviction of two aiders and abettors, Musgrave and Womack. The Court of Appeals for the Fifth Circuit declined to offer these defendants relief from a factually supported verdict merely because Bryant himself was protected against retrial.

Neither fairness nor justice argue for allowing these aiders and abettors to escape responsibility for their criminal activity merely because their respective principals have escaped punishment. The criminal law abounds with rules that often require that the guilty go free in order to safeguard the individual rights and liberties of our citizens. Thus, damning evidence of an illegal search will be excluded from a trial so as to protect the rights of the defendant to be free from an unreasonable search and seizure, even if the result might be said to be a miscarriage of justice in the individual case. In like manner, a confession will be held to be inadmissible if certain warnings are not given and the defendant's fifth and sixth amendment rights are not thereby protected. Convictions will be reversed, as well, for a host of trial errors too numerous to list in order that the principles of fair trial and due process not be encroached upon, even when the actual involvement of a criminal defendant in the crime charged is not in doubt. Although these rules are often unpopular, and sometimes misunderstood, the price that they extract from society by leaving many of the guilty unpunished, and free to repeat their transgressions, has been thought to be worth the benefits obtained in the protection of human liberty.

But Standefer, like Azadian and Musgrave, has suffered no encroachment on his liberty. He has had a full and fair trial before a jury of his peers; he has been represented throughout by able and resourceful counsel; no

unconstitutionally seized evidence or coerced confession has been admitted against him; and his due process rights have been fully safeguarded. Yet, despite all of this, it is proposed to give him refuge in the imagined remnant of a common law rule regarding the dependency of verdicts against aiders and abettors. Such a result might please those who pursue a tidy consistency for its own sake, but it would have no relationship to either the facts of this case or to a policy that seeks to promote individual liberty. It would serve no purpose, save the maintenance of a common law system of criminal classification and the fulfillment of the scholastic quiddities of the more traditional of our legal academics. We believe this Court has been correct in rejecting such an approach over the last thirty years, and we decline to accept it now. 18 U.S.C. § 2, the majority of the cases, and the Model Penal Code, all take the view that an aider and abettor should be treated like any other principal, and be required to "stand on his own two feet."[42] We see no occasion at this time, and on these facts, to alter this stance.

III. The Application of Non-Mutual Collateral Estoppel in a Criminal Prosecution.

The conclusion that we have reached in regard to 18 U.S.C. § 2 may be summarized briefly: that statute transforms the aider and abettor into a principal, abrogating any special status afforded to the former under the common law. This determination, however, does not completely resolve Standefer's appeal. For even if we were to treat Standefer as we would any other principal, it may be argued that the prior findings of the Niederberger jury should, as a matter of collateral estoppel, bar contradictory findings by the Standefer jury.

This argument is distinct from the aider and abettor issue because such a rule would not be dependent on

42. "Each participant in an illegal venture is required to 'stand on his own two feet.'" *United States v. Provenzano,* 334 F.2d 678, 691 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964).

Standefer's status as an aider and abettor, but would reflect a general policy decision to forbid the relitigation of questions already decided against the government at a prior trial, even though Standefer was not a party at the earlier trial. It is a somewhat novel argument because collateral estoppel has not been thought to apply in criminal cases when the "same parties" are not before the court.[43] Perhaps because of this, the contention does not appear to have been pressed below, nor was it fully briefed by the parties either before the original panel or before the Court *en banc.* Inasmuch as it is contrary to the policy of appellate courts to consider legal theories not of constitutional magnitude neither presented to the trial judge nor fully argued on appeal, we are reluctant to undertake an examination of this issue at this time. Nevertheless, given the arguably close relationship between collateral estoppel and the aider and abettor question already addressed, and given the interest expressed in this theory by some of our colleagues at oral argument, we are constrained to discuss this contention, although we do so with some diffidence.[44]

43. *Cf.* Ashe v. Swenson, 397 U.S. 436, 443 (1970) (emphasis supplied):

> Collateral estoppel is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit.

44. Judge Gibbons has expressed the view, in his opinion concurring in part, and dissenting in part at 66, that before trial "Standefer did come forward and put in issue the estoppel effect of Niederberger's acquittal on several counts." The contention referred to reads:

> Counts One, Three and Five of the indictment should be dismissed *since the alleged principal has already been acquitted* of the same charges. (emphasis added).

Under this heading the facts are set out in eight numbered paragraphs. The ninth paragraph then states:

> Since Cyril J. Niederberger has been acquitted of receiving said funds and Cyril J. Niederberger is *the only named principal,* this defendant cannot, as a matter of law, be found guilty *as an aider and abettor,* since a jury has already found no violation of 26 U.S.C. § 7214(a)(2) *by the principal.* (emphasis added).

This contention would appear to do no more than raise the aider and abettor issue discussed in Part II above, and there is no indication in the transcript, nor did the parties argue on appeal, that it raised the issue of non-mutual collateral estoppel. Thus, although we address this question because it is pressed on us by our colleagues, we express doubt whether the issue can fairly be said to have been raised below or preserved on appeal.

Of course, the traditional elements of collateral estoppel are constitutionally mandated in criminal cases. Thus, the double jeopardy clause of the fifth amendment prohibits the government from trying a defendant twice for the same crime. Moreover, that constitutional provision has been applied to protect an individual who has been tried and acquitted of one crime from having to relitigate, at a subsequent trial on different charges, issues decided in his favor at his first trial. *Ashe v. Swenson,* 397 U.S. 436 (1970). The justification for such an application grows out of the fifth amendment itself, which has as one of its objectives the protection of citizens from repetitive and harassing lawsuits brought by the government. Accordingly, the prosecution may not seek, through the device of separate trials on each count brought against a particular defendant, to repeat litigating the same basic issues until it is ultimately successful.

It is quite another matter, however, to suggest that this well-established policy against harassment of an individual may be invoked by one who, like Standefer, has never been put in any form of jeopardy. Within the past year, in fact, this Court has ruled that, absent mutuality of parties, the application of collateral estoppel in a criminal context is not mandated by the federal Constitution. *Hubbard v. Hatrak,* 588 F.2d 414 (3d Cir. 1978). Nor are we aware of any federal statute or common law tradition that would require our adopting such a rule in this case. But the apparent novelty of such an approach does not necessarily make it inappropriate or unwise. If non-mutual collateral estoppel would improve the criminal justice system, further important public policies, or afford needed protection for defendants' rights, we might be persuaded to embrace it as a matter of federal common law. Our analysis of the facts of this case does not convince us, however, that general application of the proposed rule would have such a salutary effect. Indeed, we are inclined to believe that its application to cases similar to this one

would, on balance, have a negative impact on the administration of criminal justice.

In civil cases, the reasons advanced for applying collateral estoppel are relatively straight-forward. It is thought that the application of the principle will (1) promote judicial economy by minimizing repetitive litigation; (2) prevent inconsistent judgments that might undermine the integrity of the judicial system; and (3) bar the harassment of a defendant through repetitious and vexatious litigation.[45] The initial inquiry in our consideration of the desirability of collateral estoppel in the criminal context must be whether these purposes are equally well served in the criminal sphere. As has often been noted, the last of these reasons—harassment—should be given weight in the criminal area where the strain on a defendant and the disparity between the parties is at its greatest.[46] But a criminal defendant *is* already protected from repetitious and harassing litigation by the double jeopardy clause. Moreover, in that the proposition now being pressed on the Court is the desirability of non-mutual collateral estoppel, harassment is not at all a relevant concern, since the defendant would be permitted to apply that principle despite the fact that he has never been tried before. Accordingly, this reason for collateral estoppel, compelling in cases such as *Ashe v. Swenson, supra,* where the defendant seeks to bar relitigation against himself of issues resolved in his favor at a previous trial, is of little force in cases such as the present one, where the defendant is being tried for the first time.

The judicial economy concern, although it is not to be minimized, is also, in our view, less persuasive in the criminal context than in the civil context. The primary purpose of a civil court is to allow private parties to resolve matters between them in an orderly, fair, and non-violent

45. *See generally* People v. Taylor, 527 P.2d 622, 117 Cal. Rptr. 70 (Cal. 1974).

46. *E.g.,* Mayers & Yarborough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 32 (1960).

manner. Once a party has been afforded a full and fair opportunity to litigate a question, considerations of judicial economy have been found to predominate as a matter of public policy, even over the risk that a previous incorrect verdict may bar a meritorious claim in an individual case.[47] This result has been rationalized on the ground that while the public itself has no overriding interest in the outcome of a particular civil trial, it does have a legitimate concern in avoiding repetitive litigation.[48]

In contrast, the purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public.

Just as was the case in our evaluation of the status of aiders and abettors, therefore, one of the most troubling points in considering the application of non-mutual collateral estoppel is the desirability of consistency of verdicts. We agree that confidence in the integrity of the criminal

47. *See Parklane Hosiery Co. v. Shore,* 47 U.S.L.W. 4079 (January 9, 1979); *Blonder-Tongue Laboratories v. University of Illinois Foundation,* 402 U.S. 313 (1971); *Bruszewski v. United States,* 181 F.2d 419 (3d Cir. 1950); *Bernhard v. Bank of America Nat'l Trust & Savings Ass'n,* 19 Cal. 2d 807, 122 P.2d 892 (1942).

48. Of course, some civil litigation, such as actions brought to enforce antitrust or antidiscrimination laws, is of consequence to the general public and not merely the parties to the litigation. With respect to this type of litigation, implementation of substantive policies, in addition to concerns with judicial economy, may influence the effect given to non-mutual collateral estoppel. *Cf.* 15 U.S.C. § 16(a) (Clayton Act judgment obtained by United States that the defendant has violated antitrust laws shall be prima facie evidence against defendant in any later private action).

justice system is, to some extent, diminished when one criminal escapes punishment while another—particularly one charged as a result of acts performed by the acquitted defendant—is convicted and sentenced. But, unlike Judge Gibbons, we do not believe the "appearance of evenhandedness" is so overriding a concern that it should, as a general matter, warrant the same type of protection as is mandated by the Constitution. To transfer, virtually untouched, a rule fashioned for the protection of an individual defendant's constitutional rights to a class of cases unrelated to the double jeopardy concern that motivated it, would be to extend the rule not to the limits of its logic, but beyond those limits.

We do not believe that the perception of evenhandedness would itself justify, except in the unusual case, the transference of civil non-mutual collateral estoppel to the criminal sphere. To forge another bar to prosecution, when the constitutional rights of the defendant are not even arguably implicated, is both unnecessary and unwise. Indeed, it may be that the loss of confidence that might occur from such a rule, as well as the loss implicit in any judicial decision not to pursue the truth-determining process, would outweigh any gain in the appearance of evenhandedness.[49]

As noted in our earlier discussion,[50] a large number of acquittals result from the enforcement of evidentiary and constitutional rules that prohibit the prosecution from proving as much as it might were it completely unfettered. These rules may be considered by some to obstruct justice because they often result in the frustration of the public's interest in the enforcement of the criminal law. But such results are accepted for good and understandable reasons.

49. As the Court of Special Appeals of Maryland recently observed:

> To acquit where guilt is confessed or conclusively proven solely to effect a "logical consistency" pits logic against common sense and permits the latter to fall.

Gardner v. State, 396 A.2d 303, 311 (Ct. Sp. App. 1979). Like the Maryland court, we are unpersuaded by the argument that the public will be more shocked by a lack of consistency than by a lack of common sense in criminal cases.

50. *See* part IID *supra.*

General application of non-mutual collateral estoppel, however, would serve to expand the effect of such acquittals to all confederates and accomplices, even when the good and understandable reasons do not apply in their cases, and no public policy would be served thereby.[51] The result would be an increase in the number of transgressors who are released, and an understandable reluctance on the part of the government to try co-defendants separately.[52]

Still another result could be the refusal by the government to prosecute some co-defendants at all for fear of jeopardizing stronger cases yet to be tried, or convictions already obtained. Judge Gibbons declines to give the proposed doctrine retroactive effect, notwithstanding an expressed concern for the "appearance of evenhandedness." Of course, the perceived inequity of inconsistent results is undiminished by the order in which such results are obtained. There is no logical reason why a verdict of acquittal as to A should inure to the benefit of B, who is awaiting trial, but that a verdict of acquittal as to B should not inure to the benefit of A, who has already been convicted.[53] But if the doctrine is to be given retroactive

51. Section 88 of Tentative Draft No. 3 of Restatement (Second) of Judgments recognizes that the application of non-mutual collateral estoppel may be inappropriate because of circumstances peculiar to the first litigation. *See id.* § 88(1), (8). Thus, any application of non-mutual collateral estoppel in criminal cases would require consideration of whether the government had a full and fair opportunity to litigate in the first proceedings those issues which it seeks to relitigate in the subsequent prosecution of another defendant.

But as Judge Gibbons notes, it is unclear whether the application of the exclusionary rule to bar the admission of unlawfully seized evidence in one case will constitute the deprivation of a "full and fair opportunity" to litigate a question. If it does not amount to such a deprivation, the application of non-mutual collateral estoppel to the criminal sphere might have the effect of undermining *Alderman v. United States*, 394 U.S. 165 (1969) inasmuch as a defendant whose rights were not violated would have the benefit of rulings as to a defendant whose rights were violated. Again no constitutional policy would be served by such a rule—only the appearance of evenhandedness.

52. As Judge Gibbons observed in *Hubbard v. Hatrak, supra,* prosecutors would understandably be reluctant to be so solicitous to a defendant's right to a separate trial under *Bruton v. United States,* 391 U.S. 123 (1968), if everything decided adversely to the prosecution in one trial is held to preclude litigation in the other.

53. Judge Gibbons points to the "finality of judgments" as the countervailing policy justifying his abandonment of the "appearance of evenhandedness" in cases where an inconsistent acquittal follows a conviction. He suggests that the finality of judgments is "equally essential to the doctrine of collateral estoppel." Concurring and Dissenting Opinion at 62.

effect, many prosecutors would need to calculate when to stop pursuing confederates and co-conspirators for fear of automatically reversing a string of successful prosecutions.[54] Alternatively, if the doctrine is not to be given retroactive effect, a decisive premium is placed on the order in which defendants are prosecuted; prosecutors would therefore have to consider carefully which cases are the stronger, and bring them only in the correct order, from the strongest to the weakest. There is no basis for believing that either alternative would improve confidence in our criminal justice system.

There is another reason that weighs against an expanded use of non-mutual collateral estoppel in the criminal context: It has been recognized that in a criminal trial a verdict of not guilty is not the equivalent of an affirmative

53. (Cont'd.)

The finality of judgments is the basis for applying collateral estoppel in the civil context. It reflects both a concern for judicial economy and for the rights of the parties to be secure in judgments obtained. It is difficult to see why either concern should apply here. As suggested above, judicial economy is not an overriding value in the criminal context. *Supra* at p. 29. Moreover, the right of the government to be secure in a judgment obtained can hardly be said to outweigh the right of a defendant to be free of an improperly obtained verdict.

Under our system of justice, criminal verdicts, if flawed, are never final. They may be, and are, persistently challenged through the writ of *habeas corpus.* If the concern for the appearance of evenhandedness truly rose to a level sufficient to justify general application of non-mutual collateral estoppel, there would be no reason other than convenience to bar previously convicted defendants from asserting it in a *habeas corpus* petition.

54. One way to mitigate this problem would be to refuse to give collateral estoppel effect to previous inconsistent judgments. This is the view taken for civil cases by the Restatement (Second) of Judgments, Tentative Draft No. 3, § 88(4) which suggests that prior inconsistent determinations of a question would preclude giving either determination estoppel effect.

Such a limitation may be helpful if non-mutual collateral estoppel is to be given general application in the criminal context. But just as is the case with the refusal ever to give an acquittal retroactive effect, the limitation on the proposed rule seems to be more the result of prudence than principle. Moreover, like the rejection of retroactivity, the use of § 88(4) in this manner places a high priority on the order of trials. The government would be advised to always try its strongest case first, thereby gaining a conviction that would allow it to try as many others as needed without fear of non-mutual collateral estoppel. The rule would give every collaborator in a crime no more than two chances at acquittal: his own trial and the trial of the first accomplice brought to trial. Except in rare cases, there seems little reason to afford a defendant more than one opportunity to avoid conviction, and no reason to place a priority on the order cases are tried.

finding of innocence.[55] If the fact finder admits to a reasonable doubt, it must acquit, whereas in a civil case a jury or judge finds facts on the basis of the preponderance of the evidence. Despite the standard of proof which governs in criminal trials, the Supreme Court held in *Ashe v. Swenson, supra,* that a court, when confronted with a collateral estoppel claim founded upon the constitutional guarantee against double jeopardy, must scrutinize the entire record of a prior proceeding to ascertain what a rational jury must have decided in reaching its decision. If a criminal defendant were to assert a claim of nonmutual collateral estoppel based on a prior criminal proceeding to which he was not a party, the court, if the collateral estoppel claim were otherwise proper, of course, would have to scrutinize the record of the prior proceeding with extreme care so as not to give the non-party defendant the benefit of any factual findings that were the result of jury confusion, doubt, or compromise.

Moreover, there are additional problems that would ensue if non-mutual collateral estoppel were generally applied in criminal cases tried before a jury. The precise determination of what a jury decided and why can be particularly difficult. In non-jury cases an appellate court is presented with the decision of a trial judge and an explanation of his reasoning. But non-jury verdicts are the exception rather than the rule. In jury cases verdicts frequently are internally inconsistent. It is for this reason that the law long ago abandoned the search for absolute consistency in jury verdicts, however desirable such a result might be in the abstract. *Dunn v. United States,* 284 U.S. 390, 393 (1932); *United States v. Cindrich,* 241 F.2d 54, 57 (3d Cir. 1957).

The possible inconsistency of verdicts rendered by even a single jury is rather pointedly illustrated by the Niederberger jury itself, which, as to certain of the counts, convicted him of receiving something of value "because of any

55. *Cf.* Standlee v. Rhay, 557 F.2d 1303 (9th Cir. 1977) (acquittal on criminal charge is not binding in a subsequent civil case inasmuch as burdens of proof differ).

official act performed or to be performed by him,"[56] but acquitted him of receiving "any fee, compensation, or reward . . . for the performance of any duty."[57] It cannot be said with any certainty what prompted the jury to arrive at these seemingly contradictory findings. An insightful observation regarding this phenomenon of disparate jury verdicts was made by Mr. Justice Holmes in *Dunn,* where, relying on a quotation from an opinion by Judge Learned Hand, he said:

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but which they were disposed through lenity.
>
> That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.[58]

Inasmuch as this is true of a single jury it is *a fortiori* true of different juries, and the likelihood of inconsistent verdicts is in fact increased in the criminal context where the evidence permitted to go to the jury may vary so substantially depending on the particular defendant and the time of trial.

Because *mutual* collateral estoppel is constitutionally required in criminal cases before a jury, Judge Gibbons challenges our reluctance to apply *non-mutual* collateral estoppel in such cases. It is no accident, however, that every case cited in support of giving a general jury verdict collateral estoppel effect—*Ashe v. Swenson,* 397 U.S. 436 (1970); *United States v. Mespoulede,* — F.2d — (2 Cir.

56. 18 U.S.C. § 201(g).

57. 26 U.S.C. § 7214(a)(2).

58. 284 U.S. at 393-94 (quoting *Steckler v. United States,* 7 F.2d 59, 60 (2d Cir. 1925)).

1979); *United States v. Venable,* 585 F.2d 71 (3d Cir. 1978) —involves a defendant seeking to assert the collateral estoppel effect of a jury verdict that was entered at *his own previous trial.* These cases are double jeopardy cases and they should not, it bears emphasizing, emphasized, be confused with the present case.

Of course, we quite agree with Judge Kaufman, whose observation in a footnote in *Mespoulede* is noted by Judge Gibbons, that the vagaries of jury deliberations—whether prompted by compromise, compassion, confusion, or hostility to the government—may not be relied upon by the government in a double jeopardy case. Otherwise the protection afforded by *Ashe v. Swenson* would be largely eviscerated. It requires a considerable leap, however, to seek to apply the language in the *Mespoulede* footnote, to cases where double jeopardy is not an issue. If a jury chooses to show compassion, or to compromise, or to otherwise mitigate what it perceives to be a severe punishment as to one defendant, that defendant ought to be given the benefits of his jury's determination at any later trial. It is a wholly different matter to suggest that any such compassion or compromise should be transfered, *ipso facto,* to another defendant who might not have merited the jury's sympathy, had he faced trial before them. A jury's decision to refuse to convict a particular defendant, despite overwhelming evidence of his guilt, is an aspect of the ancient common law tradition that has long been viewed as a final safeguard against unjust, or sometimes political, prosecutions.[59] Such verdicts, however irrational they may seem, ought not to be overturned, or even undermined, by giving the government a second opportunity to prosecute the sympathetic defendant. There is no reason, however,

59. *See, e.g.,* the discussion of the 1670 trial of two Quakers, Penn and Mead, in *D. Ogg, England in the Reign of Charles II,* 520 (1934); *see also H. Hallam, Constitutional History of England,* 614-16 (1869) ("Unfortunately it has been sometimes the disposition of judges to claim to themselves the absolute interpretation of facts, and the exclusive right of drawing inferences from them, as it has occasionally, though not perhaps with so much danger, been the failing of juries to make their undeniable right of returning a general verdict subservient to faction or prejudice." *Id.* 616.

for extending the impact of these verdicts beyond the individual defendants who have been fortunate enough to receive them.

Thus the concern voiced by Judge Gibbons that our refusal to extend *Ashe v. Swenson* type estoppel, "if pushed to its logical extreme, would prohibit collateral estoppel, not only in cases like this one, but also in double jeopardy cases," is simply misplaced. Nothing we have said undercuts the right of a defendant to plead the estoppel effect of a prior verdict in his favor, even if the court or the public is convinced he never merited that verdict. The benefits of a jury's compassion or compromise are guaranteed a defendant by the fifth amendment to the Constitution and his verdict cannot, and ought not, to be overturned even if it seems plainly erroneous. But a defendant who has never faced trial is not constitutionally entitled to the same level of protection.

It may be, of course, that even in criminal cases certain situations will arise that would warrant a court to refuse, on grounds of judicial economy or fundamental fairness, to permit the relitigation of matters already clearly resolved in a prior adjudication. In a rare federal case adopting this approach, *United States v. Bruno,* 333 F. Supp. 570 (E.D. Pa. 1971), Judge Masterson refused to allow the government to relitigate the falsity of a certain letter against two defendants charged with conspiracy after he had already ruled, in the trial of two other co-conspirators, and on the same evidence, that a jury could not possibly conclude beyond a reasonable doubt that the letter was fraudulent. And in *State v. Gonzalez,* — N.J. —, 380 A.2d 1128 (1977), the New Jersey Supreme Court, on grounds of fairness, invoked non-mutual collateral estoppel to require the suppression of evidence offered against Gonzalez when the same evidence obtained in the same manner had previously been ordered suppressed against a co-defendant. The New Jersey Court expressed a strong preference for joinder in such cases, seeing no justification for separate judicial

determinations of the same question. Similarly, in *People v. Taylor,* 527 P.2d 622, 117 Cal. Reptr. 70 (Cal. 1974), the California Supreme Court, on the grounds of fairness, used non-mutual collateral estoppel to reverse a felony-murder conviction of a defendant not even present at the site of the crime, when the defendant who had actually committed the felony had previously been acquitted because he lacked the requisite state of mind.[60]

Whatever the merits of these decisions,[61] however, whether as a matter of judicial economy, fundamental fairness, or the perception of judicial integrity, we do not believe that the reasoning employed in them can be extended to cover the present case. In those situations the determinations made by the earlier fact finders were unambiguous. In *Bruno,* the identical government case had been previously found by a judge to be insufficient as a matter of law—and the government had not sought to supplement it. In *Gonzalez,* the search of a car was found by a judge to be unconstitutional. In *Taylor,* the necessary malice to support a felony-murder verdict had not been proven as to the only defendant who could have entertained such malice. Here, in contrast, it is not at all clear what determinations resulted in the internally inconsistent Niederberger verdict.

Moreover, here the evidence before the second fact finder differed in material aspects from that presented to the first fact finder. From what can be gleaned from the *Bruno, Gonzalez* and *Taylor* opinions, the testimony, evidence and issues confronting both fact finders appear to have been identical. Here the two trials differed. Nieder-

60. *Taylor* is the only criminal case of which we are aware in which a jury finding, as opposed to a judge's ruling, has been given non-mutual collateral estoppel effect.

61. *Contrast* Clark v. State, 378 N.E.2d 850 (Ind. 1978), where Indiana, despite its adherence to the common law rule on aiders and abettors, refused to adopt a general rule of non-mutual collateral estoppel. *See also* United States v. Brown, 547 F.2d 438, 444 (8th Cir.), *cert. denied* 430 U.S. 937 (1977); United States v. Musgrave, 483 F.2d 327, 332 (5th Cir. 1973); Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958).

berger contested receipt of the gifts, at least as to whether they were received within the Western District of Pennsylvania.[62] Standefer did not. Indeed Standefer admitted giving the trips to Niederberger, and relied instead on a "social purposes" defense. The witnesses heard and the evidence admitted at the two trials accordingly varied, and the somewhat differing verdicts, if not predictable, are understandable.

In light of the different nature of the trials and the lack of certainty as to what factual findings were made by the Niederberger jury, as well as the overwhelming evidence in the record here, we are persuaded that resort to the use of non-mutual collateral estoppel in this case would be unjustified. That doctrine is of relatively recent origin, and the precise role it is to play in our criminal jurisprudence has yet to be fully established. But whatever its ultimate extent may be, we do not believe that this appeal, essentially amounting to a classic example of somewhat inconsistent jury verdicts, presents a situation in which a trial court's refusal to apply non-mutual collateral estoppel can be termed reversible error.

Accordingly, the judgment of the district court will be affirmed on all nine counts.[63]

62. Niederberger challenged the jurisdiction of the court on the ground that none of the trips was received within the Western District of Pennsylvania. Putting aside the merits of this claim, it may be that the jury concluded that the alleged defect should bar conviction as to certain trips. Of course, several other explanations of the jury's findings are possible.

63. Standefer alleges certain other errors. He argues that the trial judge, in his instructions to the jury, misrepresented the relevance of testimony of evidence showing an absence of impropriety in Niederberger's audits of Gulf's tax returns; that the trial court erred in charging the jury that there was no need to show an agreement between Standefer and Niederberger; that the court erred in failing to give prior notice to counsel that a point for charge was affirmed; that the court erred in charging the jury as a matter of law that the vacation trips provided Standefer were not authorized; that the court erred in not charging the jury that the government's failure to call Niederberger should result in an unfavorable inference; and that the court erred in failing to instruct the jury that the fact that the trips were undertaken openly and publicly could be considered as negating evidence of wrongdoing.

These points were considered by the panel that heard this appeal and it was not persuaded that a reversal of the jury's verdict is warranted. The Court *en banc* has not chosen to disturb the panel's conclusions in disregard.

ALDISERT, *Circuit Judge,* concurring and dissenting.

The majority of the court finds no fault with Standefer's convictions on Counts 1, 3 and 5 of aiding and abetting a federal revenue agent to receive a gratuity when the agent, Niederberger, as principal, had been acquitted in a previous jury trial. Count 1, relating to the Pompano Beach gratuity, charged Standefer with aiding a violation of 26 U.S.C. § 7214(a)(2);[1] Count 3 was related to the Doral Country Club, and Count 5, the Seaview Country Club. Niederberger had been acquitted of the same charges under 26 U.S.C. § 7214(a)(2), although convicted under 18 U.S.C. § 201(g)[2] with regard to the Doral and Seaview vacations. Because I would hold that Counts 1, 3 and 5 should have been dismissed as a matter of law, I would reverse those convictions and vacate the sentences imposed thereon, while affirming the convictions on the remaining six counts.

My disagreement with the majority reaches to the foundation of criminal law—*nullum crimen, nulla poena, sine lege* (no one shall be punished for anything not expressly forbidden by law). The government, not content with convictions on six facially legitimate counts, presses for an affirmance of these three controversial counts, on which concurrent sentences were imposed, for aiding and abetting a principal to commit a crime previously found not to have been committed.

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1. 26 U.S.C. § 7214(a)(2) imposes a criminal sanction against:

Any officer or employee of the United States acting in connection with any revenue law of the United States—

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty.

2. 18 U.S.C. § 201(g) provides:

Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him;

. . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

My position is straightforward and blunt—you cannot clap with one hand; it takes two to tango; to be guilty of aiding another to commit a crime there must first be a crime. I do not accept the convoluted rhetoric advanced by the government but adhere to the position I took in *United States v. Bryan,* 483 F.2d 88 (3d Cir. 1973) (in banc) (Gibbons, J., dissenting), that a person cannot be convicted of aiding and abetting a principal when that principal has been acquitted of committing the charged offense.

I.

In granting rehearing in banc, the court solicited briefing on the question whether *Bryan* should be overruled. The court, however, has now excursed into new territory beyond the jural exploration of any cited precedent, and has transformed the dubious rule of *Bryan* into a precedent *fortissimo.*

The crime charged in *Bryan* was stealing whiskey, a crime which requires proof of criminal intent. The question posed at Bryan's trial was whether the principal had a criminal intent to steal or was an "innocent dupe." The district court, sitting as trier of fact, found no criminal intent on the part of the principal and therefore acquitted him. It nevertheless found that although the principal did not intend to steal, Bryan intended that the principal steal the whiskey, and accordingly convicted him. This court affirmed Bryan's conviction as an aider and abettor.

Two factors distinguish *Bryan* from this case. First, the offense in *Bryan* required proof of the principal's criminal intent, and second, Bryan might have been charged as a principal rather than as an aider and abettor. With respect to criminal intent in Niederberger's case, however, we held that the guilt of the principal could be established by proof of

> a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his

> everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

United States v. Niederberger, 580 F.2d 63, 69 (1978). Thus, this court determined that the government, to make out a case under § 7214(a)(2), need not prove criminal intent by Niederberger to do a specific reciprocal act. Furthermore, it is a crime to receive a gratuity under 26 U.S.C. § 7214(a)(2) only if the gratuity is received by a federal revenue agent in his official capacity. Not being a federal agent, Standefer could not have been indicted as a principal as a matter of statutory definition. Standefer's convictions could thus be reversed without disturbing the viability of the rule in *Bryan*; conversely, Standefer's convictions cannot be affirmed without a dramatic extension of *Bryan.*

II.

The court characterizes its affirmance as adherence to the "clear majority position," the view of the Model Penal Code, and the view favored by most commentators. Maj. op. at 17. I disagree with this conclusion of the majority. Indeed, upon analysis, it can be seen that our court's approach here is a lonely one. The majority cites only *one* case which remotely resembles the unusual setting of this case—conviction of an aider and abettor, despite acquittal of the principal, of a crime for which he could not himself have been charged as a principal. *United States v. Azadian,* 436 F.2d 81 (9th Cir. 1971). Even the questionable decision in *Azadian* is distinguishable because the sole reason for the public official's acquittal there was the trial court's dismissal of the charge due to her entrapment by a government agent. Because the rule in the Ninth Circuit requires a defendant to admit the criminal act before he can successfully assert a defense of entrapment, it is evident that the offense by the principal was established at

the joint trial. The principal was acquitted "not because inducement establishes the fact of innocence; but because Government agents should not be permitted to act in such a fashion. The defense does not so much establish innocence as grant immunity from prosecution for criminal acts *concededly committed.*" *Id.* at 83 (my emphasis). Thus *Azadian* involved conviction of an aider and abettor when the principal's criminal acts were conceded. In an effort to apply *Azadian* to the facts in *Standefer,* the majority intimates that a similar concession exists here. Although the occurrence of certain golfing trips was established, the criminality of those events is ably and vigorously contested by Standefer and is controverted by the jury verdict at Niederberger's trial.

The majority recognizes the cases of *United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971) and *United States v. Prince,* 430 F.2d 1324 (4th Cir. 1970), which held unambiguously that no conviction of an aider and abettor can stand when the only named principal has been acquitted. And in a markedly understated tone, the majority opinion notes a "scattering" of cases which "take an ambivalent view."[3] I do not find the cases to be ambivalent; I suggest that they unequivocally oppose the result reached by the court and that they severely cloud the "clear" majority position. The question is far closer than the court is willing to admit.

Even if it were the "clear majority position" that an aider and abettor may be convicted despite acquittal of the principal, the result reached in this case is a giant step beyond the holdings in any of the cases cited by the majority. Professor Edward H. Levi has neatly described the common law decisional process: "the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding

3. *United States v. Bernstein,* 533 F.2d 775, 799 (2d Cir.), *cert. denied,* 429 U.S. 998 (1976); *United States v. Smith,* 478 F.2d 976 (D.C. Cir. 1973); *United States v. Stevnson,* 471 F.2d 143 (7th Cir. 1972), *cert. denied,* 414 U.S. 819 (1973).

of similarity or difference is the key step in the legal process."[4] Recognition of the differences between the material facts of this case and those implicated in every case cited in support of the result reached by the majority leads me to conclude that the cases do not authoritatively support the majority's result.

The Second and Tenth Circuit cases, *United States v. Deutsch,* 451 F.2d 98 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972), and *United States v. Coppola,* 526 F.2d 764 (10th Cir. 1975), were both plea bargain cases. Both affirmed aiding and abetting convictions when principals had pleaded guilty to lesser included offenses or to other counts of the indictments. Recognizing the compromise nature of such proceedings, the courts saw no inconsistency in the aiding and abetting convictions. Neither case involved the acquittal of the principal.

The Sixth Circuit case, *United States v. Kelly,* 258 F. 392 (6th Cir.), *cert. denied,* 249 U.S. 616 (1919), did not even involve an indictment under the aiding and abetting statute. In rejecting a challenge to the sufficiency of the indictment, the court's alternative answer included, *in dictum,* a statement that persons formerly chargeable as aiders and abettors "may be indicted and prosecuted as principals, whether the principal offender has been indicted and acquitted . . . or has not been indicted at all. . . ." *Id.* at 402 (citations omitted). The statement certainly cannot be regarded as part of the holding of the case.

The Eighth Circuit case, *Pigman v. United States,* 407 F.2d 237 (8th Cir. 1969), likewise involved no aiding and abetting charge. Rejecting appellant's contention that the government's theory pointed to a codefendant as the principal, the court stated that the appellant "appears to be the instigator and the principal. But if not the principal, the evidence duly shows him to be an aider and abettor. The principal need not be convicted in order to convict a person as an abettor," relying on *Hendrix v. United States,*

4. Levi, *An Introduction to Legal Reasoning,* 15 U. CHI. L. REV. 501, 502 (1948).

327 F.2d 971, 975 (5th Cir. 1964). In *Hendrix,* the appellant was charged *both* as an aider and abettor and as a principal, and his conviction was affirmed despite insufficiency of identification evidence against a codefendant. The court simply held that an aider and abettor may be convicted if he assisted a principal, even if the principal is not identified. Neither *Hendrix* nor *Pigman* stands for the broad proposition asserted by the majority.

Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958), is a very brief per curiam opinion in which it appears that the appellant was charged as a principal, not as an aider and abettor. That opinion relies on two cases, neither of which involved acquittal of a principal. In one, *Meredith v. United States,* 238 F.2d 535, 542 (4th Cir. 1956), no principal was charged, and in the other, *Colosacco v. United States,* 196 F.2d 165, 167 (10th Cir. 1952), the principal had pleaded guilty. Moreover, the more recent case of *United States v. Smith,* 478 F.2d 976, 979 (D.C. Cir. 1973), suggests that the District of Columbia Circuit would now require acquittal of an aider and abettor if the principal were acquitted:

> Jarvis was convicted upon the theory that he aided and abetted Smith. Logically it follows that if the principal Smith had been acquitted Jarvis should also have been found not guilty; in other words error that damaged Smith's defense was also prejudicial to Jarvis. Accordingly we think the interests of justice require that the conviction of Jarvis should also be reversed.

The First Circuit case of *Giragosian v. United States,* 349 F.2d 166 (1st Cir. 1965), also discussed in the majority opinion, charged an aider and abettor with a crime for which he could not have been indicted as a principal because the substantive statute, 18 U.S.C. § 656, applied only to bank officers, directors or employees. The conviction of the aider and abettor was reversed because the government had failed to produce sufficient evidence that the principal,

a bank officer who was not tried, had committed the substantive offense.

Both the Second and Seventh Circuits have recently rejected this court's position in *Bryan*. Each approved an instruction to a jury in trials of defendant principals that a codefendant aider and abettor could not be convicted without conviction of the principal. In *United States v. Bernstein,* 533 F.2d 775, 799 (2d Cir.), *cert. denied,* 429 U.S. 998 (1976), the court stated that because "it is the law that a person cannot be found guilty of aiding and abetting unless a principal whom he has aided and abetted committed the criminal act," it was not error to instruct the jury that the aider and abettor could not be convicted unless the jury also convicted the principal. *United States v. Stevison,* 471 F.2d 143, 147-78 (7th Cir. 1972), *cert. denied,* 414 U.S. 819 (1973), under almost identical facts, affirmed a similar jury instruction because "[t]he presupposition that an aider and abettor may be convicted, since 1951, absent conviction of the principal is invalid."

Therefore, our *Bryan* case and the Fifth Circuit case of *United States v. Musgrave,* 483 F.2d 327 (5th Cir. 1973), are the only two cases which unequivocally hold that the acquittal of the only principal does not preclude conviction of the aider and abettor. If circuit-counting is a proper consideration, there is more precedential support to the view I espouse than there is for this court's majority view.

III.

The court distinguishes the acquittal of the aiders and abettors in *Shuttlesworth v. City of Birmingham,* 373 U.S. 262 (1963), because "[t]he act that they had helped to bring about was simply not a criminal act" but was constitutionally protected. The court, therefore, finds irrelevant the Supreme Court's statement, "It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act." *Shuttlesworth,*

supra, at 265. But it is precisely because "Standefer himself admitted that all the vacations listed in the indictment were provided to Niederberger and paid for by Gulf," maj. op. at 20, that Niederberger's acquittal can only be interpreted as a jury finding that receipt of the vacations in question was an innocent act. I do not think *Shuttlesworth,* the only Supreme Court pronouncement on the subject, can be so cavalierly dismissed.

IV.

My focus thus far has been to demonstrate major distinctions between the material facts before us and those present in *Bryan* and other cases relied on by the majority. This is not to agree that *Bryan* was a sound decision, however, for with Chief Judge Seitz I joined in Judge Gibbons' dissent. I reaffirm my endorsement of Judge Gibbons' analysis in *Bryan;*[5] *a fortiori,* I would not extend that holding beyond the facts which controlled there. A court "must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be" sound legal precepts. *Dimick v. Schiedt,* 293 U.S. 474, 485 (1935).

What divided the *Bryan* court and what divides the court here is the weight to be placed on competing principles of criminal law when the source of decision is not unerringly supplied by precedent, statute or the Constitution. My conclusion is predicated on different principles than those selected by the majority. Three fundamental reasons convince me that an aider and abettor cannot be convicted when the only possible principal has been acquitted.

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5. Judge Gibbons has now retreated somewhat from the position he took in 1973. *See* concurring opinion, p. 59: "I agree with the conclusion in Parts I and II of the majority opinion that the acquittal of a principal does not necessarily preclude the conviction of one charged with aiding and abetting."

A.

The first is my doubt that Congress, in enacting 18 U.S.C. § 2, the aiding and abetting statute, ever intended that an aider and abettor might be convicted when the principal has been acquitted. Although this court has asserted for thirty years that a defendant may be convicted of aiding the commission of a felony under 18 U.S.C. § 2 even though the alleged principal has been acquitted, *see United States v. Klass,* 166 F.2d 373, 380 (3d Cir. 1948), I believe that our position has not properly reflected congressional intent.

Common law distinguished between felonies and misdemeanors for the purpose of accomplice liability. *See* W. LaFave & A. Scott, Criminal Law 496 (1972). The criminal responsibility of an accessory to a non-capital felony was purely derivative, that is, conviction or outlawry of the principal was an absolute prerequisite to conviction of the accessory. If the principal was unknown, at large, or pardoned prior to trial, the accessory could not be punished. Needless to say, acquittal of the principal precluded conviction of the accessory. *See generally id.* at 495-501. Where the substantive offense was a misdemeanor, however, all participants, including accessories before the fact, were considered principals in the offense and could be tried, convicted, and punished without regard to the disposition of charges against other parties. *See id.* at 496.

Under federal law, of course, there are no common law crimes. The federal courts have jurisdiction only over actions specifically proscribed by Congress. *United States v. Hudson,* 11 U.S. (7 Cranch) 32 (1812). Thus, in the nineteenth century, a person could be convicted in federal court of aiding and abetting a particular felony only if Congress had defined aiding and abetting that felony as a crime. *See, e.g., United States v. Crane,* 25 F. Cas. 691 (C.C.D. Ohio 1847) (No. 14,888). Congress, employing a variety of formulations, scattered a number of specific

accessory provisions throughout the statutes of the period. *See, e.g.,* Act of March 3, 1825, ch. 64, § 45, 4 Stat. 114 (buying stolen mail); R.S. § 5323 (1878) (piracy); R.S. § 5427 (1878) (naturalization offenses); R.S. § 5466 (1878) (destroying mail).

Where a federal statute made the substantive offense a misdemeanor, however, no specific statutory authorization was necessary to prosecute an accomplice. *See United States v. Mills,* 32 U.S. (7 Pet.) 138, 141 (1833). The federal courts simply assumed that Congress had acted on the common law principle that "all who aid, abet, procure, or advise the commission of a misdemeanor are guilty as principals." *United States v. Snyder,* 14 F. 554, 556 (C.C.D. Minn. 1882). *See also Gallot v. United States,* 87 F. 446, 448 (5th Cir. 1898).

This scheme prevailed until Congress revamped the federal penal code in 1909, when it enacted a general provision making it a crime to aid or abet the commission of any federal offense:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Act of March 4, 1909, ch. 321, 35 Stat. 1152. This provision became § 332 of the penal code and has survived without relevant substantive change. It is now codified at 18 U.S.C. § 2(a), the provision at issue in this case.

Four years after the enactment of § 332, the Ninth Circuit offered an interpretation of Congress's intent:

> The effect of the section under consideration is to abolish the distinction between principals and accessories in offenses defined in the laws of the United States, whether the same be felonies or misdemeanors. . . . [Section 332] is a recognition by Congress that the old distinction between principals and accessories

> which pertained to felonies is generally abrogated, and that a charge against one formerly known as an accessory is good against him as principal.

Rooney v. United States, 203 F. 928, 932 (9th Cir. 1913).

Several courts, including our own, accepted *Rooney's* analysis uncritically, holding that Congress had intended to treat all accessories in the same manner as accessories to misdemeanors had been treated at common law. *See United States v. Klass, supra,* 166 F.2d at 380; *Von Patzoll v. United States,* 163 F.2d 216, 218 (10th Cir. 1947). *See also United States v. Bryan,* 483 F.2d 88, 95, 98 (3d Cir. 1973) (in banc); *Kelly v. United States,* 258 F. 392, 402 (6th Cir. 1919). In the absence of other evidence, this analysis might be persuasive because Congress treated felons and misdemeanants uniformly and employed the terminology "is a principal" which was often used at common law to refer to the legal status of an accessory to a misdemeanor.

Primary evidence of congressional intent, however, is available. The final form of § 332 was reported out of the Senate on January 7, 1908. The report accompanying the bill is enlightening. *See* S. Rep. No. 10, pt. 1, 60th Cong., 1st Sess. (1908). First, the report indicates that § 332 was derived, not from common law or state statutes, but from two specific accomplice statutes then in effect, R.S. § 5323 (piracy) and R.S. § 5427 (naturalization offenses). In explaining the introduction of § 332 and its companion provision setting the relevant penalties, the Senate noted "[t]hese sections are new only in the sense that they are made general in their application. They explain themselves." *See* S. Rep. No. 10, pt. 1, at 26.

Moreover, the Senate clearly stated its purpose in enacting a general accomplice provision:

> The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.

> At common law an accessory cannot be tried without his consent before the conviction or outlawry of the principal except where the principal and the accessory are tried together; if the principal could not be found or if he had been indicted and refused to plead, had been pardoned or died before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible.

S. Rep. No. 10, pt. 1, at 13.

This report does not indicate that the Senate even recognized the common law distinction between felonies and misdemeanors for the purpose of accomplice liability, let alone intended to abrogate it entirely. I cannot conclude that Congress would have abolished such a rule of law, as suggested by *Rooney,* without indicating in some way that it perceived the rule in the first place.

In addition, the report tells us that an accomplice could be convicted when the principal escaped, failed to plead, was pardoned, or died. The Senate expressed a clear intention to remove "these" impediments to justice. Conspicuously and significantly absent from this litany is any mention of the case where the principal has been acquitted.

To the extent that *Rooney* and subsequent cases interpreted § 332 and its descendants by generalizing the common law misdemeanor rule, I believe they have been in error. Congress has spoken on the issue, and what ambiguity remains must be construed in favor of the defendant. Chief Justice Marshall, in a similar context, stressed the predominance of this latter rule over other "maxims or rules for the construction of statutes":

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). The viability of this principle has been reasserted with emphasis in recent Supreme Court opinions. *Dunn v. United States,* — U.S. —, 47 U.S.L.W. 4607, 4611 (June 4, 1979); *United States v. Naftalin,* — U.S. —, 47 U.S.L.W. 4574, 4577 (May 21, 1979); *United States v. Culbert,* 435 U.S. 371, 379 (1978).

B.

The second reason why I think acquittal of the principal requires acquittal of the aider and abettor has been aptly stated by the majority:

> The problem of allowing two seemingly inconsistent verdicts to survive is naturally troubling, and a rule of law that eliminates such apparently contradictory results is, therefore, not without appeal. Moreover, in the criminal context, the government's success in securing a guilty verdict against an aider and abettor after failing to secure such a verdict against a principal may strike some as giving the prosecution "two bites at the apple" and therefore as bordering on unfairness.

Maj. op. at 21-22. "There is much to be said, in the criminal law context, for associating the doctrine of collateral estoppel with the principles of due process. Plainly, the appearance of evenhandedness in the administration of justice weighs heavily among our jurisprudential concerns, and estoppel is directly addressed to that appearance." *United States ex rel. Hubbard v. Hatrak,* 588 F.2d 414, 417 (3d Cir. 1978). This is an institutional reason,[6] implementing the maxim that "justice must satisfy the appearance of

6. I use the description "institutional reason" in this respect somewhat differently than Professor Robert S. Summers in his important taxonomic analysis of substantive reasons in judicial opinions. *See* Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification,* 63 CORNELL L. REV. 707, 722-24 (1978).

justice,"[7] which has little to do with the individual rights of Standefer.

Surely the public will not readily understand the court's holding that a revenue agent did not receive a gift but a private citizen helped him receive the gift he did not receive. This is the stuff that "sidebars" in newspapers are made of, that smirking telecasters eagerly devour in thirty-second squibs. "People do take judicial reasoning seriously," Professor Charles A. Miller has observed, "and they are not fools nor being fooled in doing so, at least no more than in other forms of communication or with respect to other strands that form the web of a political culture."[8] Legal reasoning cannot be artificial, esoteric, or understandable only to an elite legal priesthood; it must be capable of public comprehension.

Standefer is not proposing, nor do I propose, "to give him refuge in the imagined remnant of a common law rule regarding the dependency of verdicts against aiders and abettors." Maj. op. at 26. But neither do I assume that "a tidy consistency" is equivalent to a foolish consistency,[9] and I am undaunted by accusations of pursuing "scholastic quiddities." *Id.* I insist that a small measure of consistency is essential, that there must be some dependency between aiding or abetting and the offense that is aided or abetted. Simply put, in our language these are transitive verbs. It is no justification for Standefer's conviction that public reaction to exclusionary rules may be unpopular. Public reaction to Standefer's conviction for aiding Niederberger to commit an offense which a previous jury had acquitted Niederberger of committing will be, and should be, equally unpopular.

7. *Offutt v. United States,* 348 U.S. 11, 14 (1954); *accord* 2 J. B. Atlay, Victorian Chancellors 460 (1908) (quoting Lord Herschell: "[I]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it."). *United States v. Birdman,* — F.2d —, — n.25 (Nos. 78-1940 et al., 3d Cir. 1979).

8. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 12 (1969).

9. "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Emerson, *Self Reliance* (1841).

The result I would reach concededly may be considered an application of some form of collateral estoppel. To reach the result, however, it is not necessary to broadcast a principle that non-mutual collateral estoppel will henceforth control all criminal cases in this circuit. I am mindful of the pitfalls noted by the majority which would attend promiscuous and indiscriminate application of the concept. I agree that if this were the law, "many prosecutors would need to calculate when to stop pursuing confederates and co-conspirators for fear of automatically reversing a string of successful prosecutions." Maj. op. at 33. In the rush to reaffirm and extend the rule of *Bryan,* however, the case of Mr. Standefer seems somehow to have been forgotten. Regardless of the issue on which rehearing in banc was granted, the court is deciding *this* criminal case and no other. Instead of speculating about a string of successful prosecutions in other cases, we must focus on a relatively short string of prosecutions—the successful trial of Standefer preceded by the unsuccessful trial of Niederberger. We need not theorize about complex inchoate criminal cases with multiple and lengthy trials, multiple defendants, great variations in available and admissible evidence and a host of other factors not present in this case. Our system of adjudication is the common law tradition, the adjudication of the specific instance. "Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered."[10] Our tradition "creeps from point to point, testing each step,"[11] and is preeminently a system built up by gradual accretion. We decide only the facts before us, attaching a definite detailed legal consequence to a definite detailed set of facts.

To consider consequences that might occur in other cases containing factual problems not before us is always legitimate, whether in a lawyer's brief or a judge's opinion,

10. M. Smith, Jurisprudence 21 (1909).
11. A. Whitehead, Adventures of Ideas, Chap. 2, § 6.

but it is just argument. The rules of logic inexorably limit permissible rhetoric; one risks committing the fallacy of division, erroneously reasoning that what holds true of a composite whole necessarily is true for each component part considered separately, or being seduced into the fallacy of *ignoratio elenchii,* irrelevant evidence, proving unrelated point B instead of point A, which is at issue, or disproving point D instead of point C.

Here, we are confronted with two short trials of two individual defendants on virtually identical indictments returned simultaneously by the same grand jury on essentially the same evidence involving a common set of facts. If, in this case, my analysis is an application of collateral estoppel, I do not argue that collateral estoppel is mandated by due process. But to hold that estoppel is not constitutionally required does not mean that other sound reasons do not warrant its application. I am convinced that under the facts of this case, the need for the appearance of justice demands this result. To this extent I join Judge Gibbons' views on collateral estoppel set forth in his concurring opinion.

C.

Finally, I detect in the majority's analysis what seems to be a presumption of guilt which cannot be overcome by a jury verdict of acquittal. Because of "seemingly contradictory findings," maj. op. at 35, the court apparently feels free to speculate as to what might have prompted Niederberger's acquittal—presumably something other than his innocence. The majority sees no injustice in allowing the government another chance to prove Niederberger's guilt in a second trial, so long as Niederberger is not present to defend himself. Because the government was permitted to convince *Standefer's* jury that Niederberger was guilty, the majority finds both a guilty principal and a valid aiding and abetting conviction without anyone having been placed twice in jeopardy. This reasoning is foreign

to our system of criminal law; that it constitutes fundamental unfairness to Standefer cannot be gainsaid.

The competing principles at work here are well known. The government has a justifiable interest in seeing that crime be prevented, public safety promoted, public norms of behavior vindicated by the imposition of merited punishment, and anti-social conduct deterred by the imposition of penalties. The appellant, on the other hand, invokes the guiding principle of criminal law—the presumption of innocence—and the complementary principles that penal laws are to be strictly construed, that ambiguities should not be resolved so as to embrace offenses not clearly within the law, that facts charged and proved must bring the defendant plainly and unmistakably within the statute, and that no person can be criminally punished unless the acts for which he is punished were clearly forbidden.

Judges constantly strive to seek an accommodation between these sets of competing principles. There are times, however, when the scales seem evenly balanced, when it is difficult to determine exactly where the weight does lie. At these times the jural philosophy of the individual judge comes into play, consciously or otherwise, by means of a value judgment that places a greater weight on one competing principle than another. "Indeed, the most important attributes of a judge are his value system and his capacity for evaluative judgment," writes Professor Robert S. Summers. "Only through the mediating phenomena of reasons, especially substantive reasons, can a judge articulately bring his values to bear." [12]

12. Summers, *supra* note 6, at 710.

Consider also the observations of Professor Paul Freund:

> Much of law is designed to avoid the necessity for the judge to reach what Holmes called his "can't helps," his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may therefore be said that the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.

Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93, 110 (R. Brandt ed. 1962).

The issue before us constitutes a classic example of how one's jural philosophy may predetermine a decision. When confronted by a close case in criminal law, necessitating the expression of a value judgment, I cast my lot in favor of the individual and not the society that seeks to regulate his conduct. To me this is an *a priori* proposition distilled not only from the Constitution but from the philosophical foundation of Anglo-American common law. "Administration of a technical and often semantical criminal justice system is the price we pay for the balance struck in the Constitution between the federal government and the individual defendant." *Bryan, supra,* 483 F.2d at 99 (Gibbons, J., dissenting).[13] The balance is struck because, in Dean Rostow's words, "[t]he root idea of the Constitution is that man can be free because the state is not." [14]

The expression of this value judgment is not confined to the fashioning of a rule for a particular case. It begins with the choice of a controlling legal precept, continues through the interpretation of that choice, and persists finally in the application of the precept as interpreted to the facts at hand. Value judgments inhere throughout;

13. "The problem is not so much that the acquittal of the so-called principal requires the acquittal of the aider and abettor. Under such as 18 U.S.C. § 2, the aider and abettor is in law guilty of the substantive offense to the same extent as the so-called principal. The offense of each is complete in itself without the dependency of one on the other . . . . The grand jury did not indict Bryan as a principal. It did not indict him as an aider and abettor of persons unknown. It indicted him as an aider and abettor of a specific named principal. The Government in response to a motion for a bill of particulars reiterated that Echols was the thief who stole the whiskey with an intent to convert it to his own use and that Bryan aided and abetted Echols by supplying the means by which Echols converted the whiskey to Echols' own use. . . . The district court may not convict him of being an aider and abettor on the basis of evidence relevant only to a charge of being a principal; a charge for which he was not indicted." *United States v. Bryan, supra,* 483 F.2d at 98 (Gibbons, J., dissenting).

14. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

it is not a mechanical process.[15] Values do not form in a vacuum; their range depends always on factual limitations. Thus, judges' decisions are governed by their beliefs about facts as well as abstract rules; the act of deciding involves both the determination of material facts and the determination of what rules are to be applied to the facts. Jerome Frank observed, cynically perhaps, that a judge "unconsciously selects those facts which, in combination with the rules of law which he considers to be pertinent, will make 'logical' his decision."[16]

At bottom there are two dimensions of this court's division, a division which can be traced to basic differences in values. One dimension involves the analysis of the materiality of the facts in this case and the facts in other cases cited by the court. To decide which facts are similar and material is a purposeful decision. The second dimension is the decision to extend a rule to a variant set of facts. To do this a judge must first be convinced that the rule being extended is a desirable one. I find the *Bryan* rule offensive to the integrity of our judicial institution and to those principles protecting an individual's freedom, which I believe deserve priority over those favoring the society that would regulate him. For these telling reasons I am loathe to extend the rule beyond the limited facts which gave it birth.

Chief Judge Seitz joins in Judge Aldisert's opinion except that his dissenting position is based solely on IV-A of the opinion.

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15. In deciding whether to apply a given precept to a case before him, the judge must, if he is to be guided or controlled by substance rather than form, accommodate the interests now pressing for recognition in terms of the interest accommodations made by the precept in question. If he determines that there is a complete correspondence between the specific interests before him and the interests considered and accommodated in the precept, the case can be "decided" by applying, through a process of logical analysis, that precept. The crucial step, the decision that the abstract pattern of interests accommodated in the precept and the concrete pattern to be accommodated, is not a purely mechanical operation.

A. Von Mehren, The Civil Law System 822 (1957).

16. J. Frank, Law and the Modern Mind 134-35 (1930).

Gibbons, C.J., concurring in part, and dissenting in part:

I agree with the conclusion in Parts I and II of the majority opinion that the acquittal of a principal does not, as a matter of statutory interpretation, necessarily preclude the conviction of one charged with aiding and abetting. I cannot, however, accept the majority's reluctance to acknowledge a role for non-mutual collateral estoppel in criminal cases. Moreover, I am persuaded that this case may well be an appropriate instance in which to apply it.[1] Indeed, the majority's statutory analysis, eliminating the distinction between principals and aiders and abettors, and thus treating Standefer as if he were Niederberger, logically points to the application in Standefer's favor of the collateral estoppel that would be available to Niederberger.

In *Hubbard v. Hatrak,* 588 F.2d 414 (3d Cir. 1978), this Court held that non-mutual collateral estoppel was not required in criminal cases by the Due Process Clause of the Constitution. Accordingly, we noted, in the absence of state law to the contrary, appellant Hubbard could not attack his conviction for felony-murder on the ground that his accomplice had previously been convicted simply of second-degree murder. Nevertheless, we recognized that there is a significant interest in the appearance of fairness, an interest which may often be vindicated by a policy of collateral estoppel.

> There is much to be said, in the criminal law context, for associating the doctrine of collateral estoppel with the principles of due process. Plainly, the appearance of evenhandedness in the administration of justice

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1. By urging a consideration of non-mutual collateral estoppel in this case, rather than contending that the acquittal of a principal requires the acquittal of an aider and abettor, I do not retreat from the views I expressed in my dissenting opinion in *United States v. Bryan,* 483 F.2d 88 (3d Cir. 1973) (en banc). In *Bryan* I stated that because Bryan was explicitly indicted as an aider and abettor of a named principal, he could not be convicted "on the basis of evidence relevant only to a charge of being a principal." 483 F.2d at 98. To do so would be to convict Bryan of "a charge for which he was not indicted." *Id.* Because of this variance from the indictment, I thought Bryan's conviction could not stand. No issue of variance is presented on this appeal.

> weighs heavily among our jurisprudential concerns, and estoppel is directly addressed to that appearance. For that reason thoughtful observers probably will applaud the introduction of non-mutual collateral estoppel into New Jersey criminal law.

588 F.2d at 417-18. Thus, we could not say that the "appearance of evenhandedness in the administration of justice" was of constitutional dimensions, we acknowledged that it "weighs heavily among our jurisprudential concerns."

A concern for the appearance of evenhandedness in the administration of justice persuades me that where the government has truly had a full and fair opportunity to prove its case, any fact which was necessarily determined against it should be applied in a second defendant's favor in a new trial.[2] The majority, on the other hand, seems to use a different scale in gauging the weight of this fairness concern.

> We agree that confidence in the integrity of the criminal justice system is, to some extent, diminished when one criminal escapes punishment while another—particularly one charged as a result of acts performed by the acquitted defendant—is convicted and sentenced.

Majority Opinion, *ante,* at 30-31. Nevertheless, it adds, "we do not believe the 'appearance of evenhandedness' is so overriding a concern that it should, as a general matter, warrant the same type of protection as is mandated by the Constitution." *Id.* Many of the reasons marshalled by the majority for relegating collateral estoppel virtually to a legal oblivion are beside the point. First, the opinion notes, "a large number of acquittals result from the enforcement of evidentiary and constitutional rules that prohibit the prosecution from proving as much as it might

2. See *Restatement (Second) of Judgments,* § 88 (Tent. Draft No. 2, 1975), *quoted with approval in State v. Gonzales,* 75 N.J. 181, 380 A.2d 1128, 1132 n.5 (1977).

were it completely unfettered." *Id.* at 36. This, however, is not an argument against the application of non-mutual estoppel in all criminal cases; rather, it is a reason why great care must be exercised in deciding whether the government has truly had a full and fair opportunity to prove its case, and whether a particular fact was necessarily determined against it in the prior litigation. Some, but not all, constitutional and evidentiary rules do deprive the government of a "full and fair" opportunity to prove its case. Where, for example, the defendant in the first trial claimed the protections of the fifth amendment, the government has been foreclosed from establishing as much as it legitimately might in the absence of such a claim. The fifth amendment vindicates a uniquely personal right of privacy, *see generally* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 Harv. L. Rev. 945 (1977), and thus a second defendant is not entitled to the collateral estoppel benefits of the first defendant's personal right. On the other hand, where the first acquittal was the result of the government's inability to introduce unlawfully seized evidence, a second defendant, as to whom that evidence would also be relevant—and perhaps even independently admissible—might be permitted to assert an estoppel defense. The issue, of course, is not free from doubt and I leave for another time the question of whether fourth amendment requirements, together with other constitutional and evidentiary restrictions, effectively preclude the government from a full and fair opportunity to prove its case. That is, unless the majority's apparent aversion to collateral forecloses further consideration of these issues.

Second, the majority opposes non-mutual collateral estoppel because it suspects that the government may refuse "to prosecute some co-defendants at all for fear of jeopardizing stronger cases yet to be tried, or convictions already obtained." Majority Opinion, *ante,* at 32. If subsequent cases are indeed stronger, because of different

procedural opportunities or newly available evidence, collateral estoppel treatment need not be given to the first decision.[3] It is only where the government had had a truly full and fair opportunity to press its position that a subsequent bite at the apple is precluded. Moreover, adherence to the policies of collateral estoppel does not require a court to overturn previous convictions because of subsequent acquittals. While the principle of evenhandedness is undoubtedly implicated in such inconsistent verdicts, a respect for the finality of judgments—equally essential to the doctrine of collateral estoppel—requires leaving well enough alone no trouble endorsing a future-focused policy of estoppel, barring the government from repeated efforts at establishing the same fact or facts, while at the same time opposing a backward-focused policy which would make a nullity of prior judgments. The issue is whether the government, having lost once, should be given a second opportunity. The majority's discussion of retroactivity, introduced for the purpose of injecting the emotional issue of collateral attacks on criminal judgments, is a straw man argument.

The majority is also uncomfortable with non-mutual collateral estoppel in criminal cases because it might allow a defendant to plead as an established fact what may have been the result of doubt, confusion or compromise. But this argument surely proves too much. As the Second Circuit recently observed

3. *See, e.g., id.*, § 88(2), *quoted with approval in Gonzalez, supra,* at 1132 n.5:

> § 88. Issue Preclusion in Subsequent Litigation with Others.
>
> A party precluded from relitigating an issue with an opposing party, in accordance with §§ 68 and 68.1, is also precluded from doing so with another person unless he lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify according him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in § 68.1 and also whether:
>
> . . . .
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined. . . .

> [T]he Government suggests that the jury may have compromised, and hence what was actually decided can never be known. But this assertion is made in the teeth of clear case law that the possibility that the jury acquitted out of a desire to compromise or to show mercy, or from "simple frustration after hours of tedious debate," *United States v. Flowers,* 255 F. Supp. 485, 487 (E.D. N.C. 1966); *see, e.g., Cosgrove v. United States,* 244 F.2d 146, 154 (9th Cir. 1955), is not a basis for refusing to apply collateral estoppel. A contrary rule would, of course, eviscerate the doctrine altogether, for no one who is not present during the jury's deliberations can ever know precisely how the jury reached its verdict.

United States v. Mespoulede, No. 78-1428 (2d Cir., decided Apr. 10, 1979). Moreover, the majority's contention—that the previous verdict may have been compromised or confused—would seem to bar estoppel, not only when it is a *second* defendant who seeks the benefits of that verdict, but also in instances where the defendant in the first trial is tried on a new count or related charge. Yet, collateral estoppel is plainly available—indeed constitutionally required—in these latter cases, despite the possibility of compromise or confusion. *See Ashe v. Swenson,* 397 U.S. 436 (1970); *United States v. Venable,* 585 F.2d 71 (3d Cir. 1978).

The majority also suggests that the anti-harassment aspect of double jeopardy disappears in the non-mutual context because Standefer has not been tried before. Majority Opinion, *ante,* at 29. The difference between mutual and non-mutual collateral estoppel here, however, is one of degree. To suggest that Standefer, though not a party to the Niederberger trial, was not subjected to an accusation that he bribed Niederberger, is to elevate form over substance. Standefer's alleged conduct certainly was exposed to public scrutiny and his reputation tarnished.

Finally, the majority notes that "[t]he precise determination of what a jury decided and why can be particularly difficult. In non-jury cases an appellate court is presented with the decision of a trial judge and an explanation of his reasoning. But non-jury verdicts are the exception rather than the rule." Majority Opinion, *ante,* at 34. Once again, this argument, if pursued to its logical extreme, would prohibit collateral estoppel, not only in cases like this one, but also in double jeopardy cases. Yet, the Supreme Court has, in the latter context at least, expressly enjoined trial courts to " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Ashe v. Swenson, supra,* at 444 (quoting Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 Harv. L. Rev. 1, 38-39 (1960)). In so doing, courts are not to be bound by the "hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe, supra,* at 444. Surely the capacity of courts to pursue the inquiry into what was finally determined by a prior verdict does not dissolve outside the narrow range of double jeopardy cases. We do it in civil cases tried to a jury with relatively little difficulty.

In the final analysis, I suppose I simply take more seriously than the majority the perception of unfairness inherent in the disparate treatment of similarly situated defendants. I do not think the public is oblivious to the marked differences in legal and financial resources that exist between separate defendants and which often result, for all intents and purposes, in an acquittal for one and a conviction for another. And I agree with Judge Aldisert that "the public will not readily understand the court's holding that a revenue agent did not receive a gift but a private citizen helped him receive the gift he did not re-

ceive." Concurring and Dissenting Opinion, at 53. Evenhandedness cannot, of course, be pursued in isolation from the legal obstacles which preclude a full and fair hearing for the government; neither can it blind us to the fact that, very often, it will be impossible to discern what a given adjudication finally determined. However, evenhandedness counts for something, and the majority cannot wish it away on the strength of rationales that suggest abrogation of the doctrine in the double jeopardy, and in many civil contexts as well.[4]

Believing as I do that non-mutual collateral estoppel should occasionally be available in criminal cases, it seems to me useful to sketch briefly how the doctrine should operate procedurally. In *United States v. Inmon,* 568 F.2d 326, 330 (3d Cir. 1977), we noted that double jeopardy is a defense which must be pleaded by the defendant. Since a defendant's interest in avoiding double jeopardy is a matter of constitutional right, it follows that where double jeopardy is not involved, and the defendant's interest in collateral estoppel is strictly non-constitutional, the defendant must also come forward and put in issue the question of estoppel. The government may then present evidence tending to show that it lacked a full and fair opportunity to prove its case the first time, or that the fact which the defendant seeks to foreclose from relitigation was not actually determined in the first proceeding. The ultimate burden of establishing that the fact in question

4. The majority cites several cases which have rejected the application of non-mutual collateral estoppel to criminal trials. It is true that the policy has not thus far achieved extensive support. There are, of course, a number of courts who have accepted such estoppel claims. *See, e.g., United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971) (acquittal of principal would require acquittal of aider and abettor); *United States v. Prince,* 430 F.2d 1324 (4th Cir. 1970) (per curiam) (same); *United States v. Bruno,* 333 F. Supp. 570 (E.D. Pa. 1971); *State v. Gonzalez,* 75 N.J. 181, 380 A.2d 1128 (1977); *People v. Taylor,* 527 P.2d 622, 117 Cal. Rptr. 70, 12 C.3d 686 (1974). *Cf. also United States v. Casper,* 541 F.2d 1275, 1278-79 (8th Cir. 1976) (apparently accepting the reasoning of the trial court that the lack of privity between the defendants in the first and second trials did not bar the application of collateral estoppel). Nevertheless, as the majority itself observes, "the apparent novelty" of non-mutual collateral estoppel in criminal case "does not necessarily make it inappropriate or unwise." Majority Opinion, *ante,* at 28.

was actually determined in the first litigation rests with the defendant, who seeks the protections of estoppel. *See, e.g., United States v. Seijo,* 537 F.2d 694, 697 (2d Cir. 1976), *cert. denied,* 429 U.S. 1043 (1977); *United States v. Davis,* 460 F.2d 792, 796 (4th Cir. 1972); *United States v. Smith,* 446 F.2d 200, 202-03 (4th Cir. 1971). The government, on the other hand, retains the burden of establishing that it did not receive a full and fair opportunity to litigate the issue sought to be foreclosed.

Once the pleadings are before the trial court, that court must decide whether the issue was actually determined in the first trial, and whether the government had a fair opportunity to establish its version. In discharging this function, trial courts would, pursuant to the *Ashe* Court's injunction, survey the record of the first trial and determine whether a rational jury could have predicated its decision on a basis other than that which the defendant seeks to foreclose. The trial judge is invested with great discretion in performing this task. He must, in addition, consider any arguments offered by the government which suggest why a full and fair opportunity to establish the facts was not available in the first trial. I have suggested above how some of these latter concerns might be resolved.[5]

In the instant case, Standefer did come forward and put in issue the estoppel effect of Niederberger's acquittal on several counts. See Appendix, at 17a-19a (motion to dismiss). While his contention could have been more artfully presented, I think, at the very least, he has preserved the estoppel question for purposes of review. Because Standefer's estoppel claim was imprecise, the trial court did not rule on the motion. Thus, to the extent that estoppel is arguably available in this case, I believe a remand to the trial court is required.

Standefer contended that a judgment of acquittal should have been entered on Counts 1, 3, and 5 of the indictment against him. Count 1 charged a violation of 26

5. *See* p. 61 *supra.*

U.S.C. § 7214(a)(2) in connection with the alleged Pompano Beach gratuity; count 3 charged a violation of the same statute in connection with the Doral Country Club; count 5 charged a violation of the same statute in connection with the Seaview Country Club. Because Niederberger had been acquitted of these same charges, Standefer sought to foreclose relitigation of the charges in his trial. As I noted above, the trial court did not reach the estoppel question. As to counts 3 and 5, however, this was harmless error. While the first jury did acquit Niederberger under 26 U.S.C. § 7214(a)(2) of the Doral and Seaview offenses, it nevertheless convicted him of those same transactions under 1 U.S.C. § 201(g). These inconsistent verdicts perhaps reflected a misconception on the jury's part of the appropriate legal standards for liability under the two statutes. Whatever the reason for the jury's confusion, however, such inconsistent verdicts cannot serve as the basis for collateral estoppel. *See, e.g., Harary v. Blumenthal,* 555 F.2d 1113, 1116-17 (2d Cir. 1977).

The Pompano Beach violation in count 1, however, cannot be similarly dispatched. Niederberger was acquitted under both statutes for the Pompano Beach violation. As the majority notes, Niederberger testified in his own behalf, and there is no showing on this record why collateral estoppel is not at least arguably appropriate. Accordingly, I would remand for district court findings on this count.

The majority, in its effort to play both sides against the middle, contends that even if non-mutual collateral estoppel may occasionally be recognized, this is not the case in which to do so. The majority reasons that the inconsistent verdicts effectively undermine the preclusive effect of the entire Niederberger verdict, even with respect to the Pompano Beach count. I disagree. Whatever inconsistencies were inherent in the other charges against Niederberger, the findings with respect to Pompano Beach were thoroughly consistent. In *Rogers v. LaVallee,* 517

F.2d 1330 (2d Cir. 1975), *cert. denied,* 423 U.S. 1078 (1976), the Second Circuit considered an analogous issue. A defendant had been acquitted on charges of first and second degree kidnapping under one section of a kidnapping statute; the jury was hung, however, on first and second degree charges under another section of the statute. The defendant was retried on the first degree charge and was convicted, despite the fact that he had already been acquitted of second degree kidnapping, a necessary element in the first degree charge. The district court rejected defendant's habeas corpus motion, in which he had urged collateral estoppel based on double jeopardy. The court reasoned that the apparent inconsistencies in the verdict as a whole precluded the court's finding that any binding determination in defendant's favor had been made. The Second Circuit rejected that view, however. In reversing and granting the writ of habeas corpus, the court declared:

> The difficulty with the district court's point of view, however, is that it rests on the proposition that "viewing the verdict herein as an entity and as a whole, I cannot find that the jury herein necessarily acquitted petitioner of kidnapping 2nd degree." In fact, however, the jury did just that, however erroneously and no matter how confused. The verdict was an express acquittal of kidnapping in the second degree. It was rendered without correction by the trial court and without objection to the inconsistency by the prosecution.

517 F.2d at 1334 (footnote omitted). Admittedly, this was a double jeopardy case; yet, the principle of evenhandedness also requires courts to give full effect on final judgments, without ascribing to those judgments the inconsistencies inherent in other parts of a jury's determinations.

The majority also rejects the application of estoppel in this case because, it reasons, the evidence in Standefer's trial was different from that introduced against Nieder-

berger. Specifically, the majority notes, Standefer testified at his trial and did not contest the receipt of the trips. But that objection misses the point. If estoppel had been granted at the outset, Standefer may never have had to testify or present a defense. Because Standefer's testimony might never have been offered had his estoppel claim been granted, it cannot be said that the admittedly damaging evidence elicited from him renders the estoppel question harmless or, in the majority's view, irrelevant.

* * *

The majority straddles an uneasy line in this case. It refuses to endorse non-mutual collateral estoppel in criminal cases while balking at rejecting the doctrine outright. In its labored effort to avoid any resolution of the issue, it fails adequately to suggest why, if estoppel is ever to be applied, this is not an appropriate occasion to do so. But I reserve for last a more important criticism than any having to do with the particular result reached by the majority, a result which, I concede, is a respectably arguable one. Specifically, I object to the premises upon which the majority in this case has acted. The majority argues

> The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction.

Majority Opinion, *ante,* at 30. In the first place, the argument in favor of non-mutual collateral estoppel in criminal cases is not, as the quoted language tacitly suggests, based upon concerns for judicial economy. I agree that concerns for judicial economy should play a much smaller role in criminal justice decisionmaking that they do.

Next, I am less confident than the judges in the majority in my capacity, or theirs, to know what is an "erroneous acquittal." The institution of jury trial supplanted trial by ordeal, not because juries were thought to be more likely to achieve objective truth than were druids or soothsayers, but because the participation in the fact-finding process of a cross-section of the community was deemed to lend a sufficient legitimacy to that imperfect process to make publicly acceptable the imposition of sanctions. In the criminal context, when the sovereign fails to convince that ad hoc tribunal, sanctions are not imposed. But the application or withholding of sanctions results not because the verdict is either correct or incorrect in any objective sense, but because under our legal system our government has chosen not to sanction when it fails to convince beyond a reasonable doubt. Despite their confidence, neither I nor the judges in the majority can really determine that the *Niederberger* acquittal was erroneous. Indeed the odds are exactly even that when the government is given a second chance to convince a new jury of a given set of facts the second verdict, rather than the first, will be objectively incorrect. The issue is not whether either verdict is correct, but whether the government, having gone to the well once, should be given a second opportunity. When the defendant is the same, the double jeopardy clause prohibits the second trip to the well without regard to the correctness or incorrectness of the initial verdict. When the defendant is, by virtue of 18 U.S.C. § 2, treated as if he is the same, it is hard to identify the justification for a different outcome. And, while non-mutual collateral estoppel is not constitutionally mandated, I submit that its desirability as a non-constitutional rule of criminal law should also be determined without engaging in speculation as to which of two successive verdicts on the same alleged facts is more likely to be correct.

In addition, the majority's statement that "the purpose of a criminal court is . . . to vindicate the public interest

in the enforcement of the criminal law," Majority Opinion, *ante,* at 30, discloses an erroneous view both of the public good and of the role of an independent judiciary in a sanctioning system. Sanctioning, ultimately, depends upon the availability of physical power. A sovereignty, having a practical monopoly upon the application of physical power, could sanction merely by the application of that power. Resort to the ritual of courts and trials, however, reflects a desire to gain public acceptance for the imposition of sanctions, thereby hopefully reducing the incidence of resistance and the need to resort to force. Our democratic legal system is predicated upon the assumption that such ends are desirable. Accordingly, our rules for criminal justice sanctioning have been carefully designed so as to maximize both the fact and appearance of fairness, by deliberately tilting many rules in favor of the defendant and against the sovereign. In a given instance the result of that system may be to deprive the sovereign of the opportunity to punish a malefactor. But that result can be deemed a public harm only if one loses sight of the long-range benefits of a system deliberately designed to tolerate such results. Their occasional occurrence is no public harm but rather a public good, in that they represent the system's functioning as it was designed to function. Moreover, judges do not possess physical coercive power, but serve only to legitimate its imposition. Since legitimation is the essential contribution of the judicial system, judges act consistently with their function, and thus in the public interest, only when they adopt rules maximizing fairness to defendants. If those rules occasionally produce results which temporary majorities abhor, that should be of little concern to the courts, for our perspective must be determined by the long-range benefits accruing from our efforts to secure the appearance of fairness. By pursuing fairness, rather than acting as law enforcement agents, we achieve, in the long-run, the willing consent of the governed. The republic will not fall because the court concludes that the

government should, when it loses before one jury, be collaterally estopped from proceeding on the same issues before another. But it will be endangered if judges conclude that they must "vindicate the public interest in the enforcement of the criminal law," rather than develop rules which satisfy the claims of individual fairness.

Because I accept a role, albeit limited, for collateral estoppel in criminal cases, and because the trial court has not yet made the findings sufficient to show why estoppel is inappropriate in this case, I respectfully dissent from the affirmance of Standefer's conviction on the Pompano Beach count. I concur, however, in the affirmance of the Doral and Seaview convictions.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1909

UNITED STATES OF AMERICA

vs.

STANDEFER, F. W.,
Appellant

(D.C. Criminal No. 77-00139-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, GARTH AND HIGGINBOTHAM, Circuit Judges

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on December 12, 1978 and later reargued en banc on May 17, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 19, 1978, be, and the same is hereby affirmed.

ATTEST:
M. Elizabeth Ferguson
Chief Deputy Clerk

August 10, 1979

Appendix C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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March 14, 1979

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Craig R. McKay, Esquire
Robert J. Cindrich, Esquire
United States Attorney
633 U. S. Post Office & Courthouse
Pittsburgh, Pa. 15219

Re: United States of America vs. Standefer, F. W.,
Appellant - No. 78-1909.

Gentlemen:

The Court has directed me to advise counsel that the above matter will be listed for in banc consideration on May 17, 1979, and the briefing schedule will be as follows:

Appellant's brief due April 2, 1979;

Appellee's brief due April 16, 1979.

Counsel are also advised that in briefing the case the Court would like them to focus on the following two questions:

1. Whether Congress, in enacting 18 U.S.C. §2(a), intended to allow conviction of an aider and abettor even though the named principal has been acquitted.

2. Whether United States v. Bryan, 483 F.2d 88 (3d Cir. 1973), should be overruled.

Very truly yours,

T. F. Quinn, Clerk

TFQ:mef

APPENDIX D

Opinion

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
vs.) Criminal No. 77-139
F. W. STANDEFER)
Dated: May 24, 1978

OPINION

KNOX, District Judge

The defendant F. W. Standefer together with Gulf Oil Corporation and Joseph F. Fitzgerald was charged in a nine-count indictment with offenses in connection with giving fees, compensation or rewards not prescribed by law to Cyril J. Niederberger, a supervisory internal revenue agent who was case manager for the audit of Gulf Oil Corporation income tax returns for the years 1959 to 1964, inclusive. The evidence showed that Standefer and Fitzgerald were vice presidents of Gulf Oil Corporation, Standefer being vice president in charge of tax administration.

The indictment contained counts of two types. Counts 1, 3, 5 6 and 9, the odd numbered counts, charged that Standefer together with Gulf Oil and

Fitzgerald aided and abetted Niederberger in receiving fees, compensation and rewards not provided by law for the performance of his duties as internal revenue agent in violation of 26 USC 7214(a)(2). 1/ Specifically they were charged with giving him vacation trips and outings to such places Beach, Doral Country Club, both in Florida, Sea View Country Club in New Jersey, Pebble Beach in California and Las Vegas, Nevada. The expenses of such trips were paid by Gulf Oil Corporation. The even numbered counts, 2, 4, 6, and 8 charge these defendants with promising, offering and giving things of value to wit: the same vacation trips to a supervisory internal revenue agent in violation of 18 USC

1/ "(a) Unlawful Acts of revenue officers or agents. Any officer or employee of the United States acting in connection with any revenue law of the United States . . .

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or . . .

201(f) and 18 USC 2. 2/

The only variation is that count 1 only charges payment of the balance due on the motel bill at Pompano Beach. (Gulf Oil did not pay for the transportation. Niederberger was in Florida on business.)

Previous to the case being called for trial Gulf Oil Corporation pleaded guilty and was sentenced and Fitzgerald pleaded nolo contendere and was sentenced after the trial.

2/ 18 USC 1201(f) "Whoever, otherwise than as provided by law for the discharge of official duty, directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

18 USC 2 "(a) Whoever commits an offense against the United States or aids, abets, counsels, commends, induces or procures its commission, is punishable as a principal. "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, c. 645, §1 62 Stat 684; Oct 31, 1951, c. 655 §17b, 65 Stat 717)."

Standefer went to trial on November 28, 1977, and on December 8, 1977, after a trial requiring eight trial days was found guilty by the jury on all counts. He has now filed motions for a new trial or in arrest of judgment alleging in the original motion 22 reasons and in a supplemental motion timely filed 3 additional reasons for new trial or arrest of judgment. The parties have thoroughly briefed the questions involved, have orally argued the same before the court and the matter is now ready for disposition.

Prior to Standefer's trial, Neiderberger had gone to trial before Judge Snyder of this court on similar charges particularly for accepting illegal gratuities from Gulf Oil Corporation in the form of these trips paid for by Gulf in violation of 7214(a)(2) and 201(g). Neiderberger was convicted on certain counts and found not guilty on others, particularly, he was found not guilty on counts in his indictment numbers 1 and 2 relative to the trip to Pompano Beach, Florida and also counts 4 and 6 relative to trips to Absecon, New Jersey and Pebble Beach, California. He was sentenced on March 29, 1977 and appealed his sentence to the Court of Appeals for the Third Circuit which on May 5, 1978, affirmed the same. See opinion in

No. 77-1575 in the Court of Appeals filed May 5, 1978.

(1) Facts.

The facts in this case have succintly been set forth in the opinion of the Court of Appeals in the following excerpt from the Neiderberger case (references as to the exact counts of the Neiderberger case are omitted):

"The facts, briefly summarized, are as follows: During the period between 1971 and 1974, Niederberger was employed by the IRS in its Pittsburgh office as a large case manager. This position required Niederberger to supervise a group of revenue agents assigned to audit certain corporate income tax returns filed by Gulf. Among Niederberger's responsibilities were the development and final approval of the audit plan, which is a detailed outline of the specific procedures to be utilized during the course of a particular audit. During the development of an audit plan, Niederberger was empowered to make all final decisions regarding the scope and depth of the areas of corporate taxation which were to be reviewed in the audit.

"Further, in his position as the large case manager for Gulf, Niederberger had occasion to supervise the audits of Gulf's tax returns for the years 1960 through 1970, inc. Following the completion of a particular year's audit, representatives of Gulf would confer with Niederberger's staff to discuss the tax adjustments which the revenue agents determined were required by the audit. In each instance Gulf agreed to pay the proposed additional assessment without resort to available

administrative appellate procedures.

"During the same period that Niederberger was serving as the case manager for the Gulf audits, he accepted from Gulf - and at Gulf's expense - several golfing junkets at various resorts. More preciasely, in January of 1973, Niederberger spent four days at the Doral Country Club in Miami Beach, Florida, in the company of Mr. John F. Fitzgerald who, at that time, was the Manager of Federal Tax Compliance for Gulf. Niederberger's entire bill was transferred to Fitzgerald's account, which was subsequently charged to Fitzgerald's American Express card.

"In August and September of 1973, Niederberger and his wife spent four days at the Seaview Country Club in Absecon, New Jersey, in the company of, among others, Mr. Fred W. Standefer, Gulf's Vice President of Tax Administration. The Niederbergers' expenses at Seaview were billed to Mr. Arthur V. Harris, who listed his billing address as the Gulf Oil Building, Pittsburgh, Pennsylvania.

"In April of 1974, Niederberger spent four days at the Del Monte Lodge in Pebble Beach, California, in the company of both Fitzgerald and Standefer. Again, Fitzgerald charged Niederberger's bill to his American Express card.

"Two months later, in June of 1974, Niederberger and his wife were guests of Fitzgerald for five days at the Desert Inn and Country Club in Las Vegas, Nevada."

In addition to the above recited facts, the evidence in this case also showed payment of bill of

Neiderberger's in Pompano Beach, Florida in 1971. It also showed that Fitzgerald had acted under orders from Standefer and that in addition while at the Desert Inn, in Nevada, Standefer caused Fitzgerald to pay Neiderberger $200 in cash. It further appeared that Niederberger had been assigned in December 1973 to investigate political contributions made by Gulf Oil routed through its subsidiary Bahamas Exploration Ltd, a Bahama Corporation. He had turned in a report in March, 1974, just before the Pebble Beach outing recommending no further investigation of Gulf's contributions which it developed were much greater than revealed.

There was also testimony as to expensive Christmas parties and golf outings in the Pittsburgh area attended by Neiderberger and other IRS agents.

In considering the evidence the court views it in the light most favorable to the government. Government of the Virgin Islands v. Peterson, 507 A 2d 898 (3d cir 1975).

The court holds that on the basis of the above facts there was sufficient evidence before the jury to convict the defendant beyond a reasonable doubt

of the offenses with which he was charged and that the entire matter including his intent was for the jury to decide. This disposes of reasons 1 and 2 in the motion for new trial or in arrest of judgment.

Having thus determined that there is sufficient evidence generally to justify the conviction, we will not turn to the detailed reasons given for arrest of judgment and/or for new trial.

(2) Aiding and Abetting - Acquittal of Niederberger

Reasons Nos. 3, 4, 5, and 6.

As previously noted, Niederberger was acquitted on counts 1, 2, 3 and 4 of his indictment and defendant contends that his conviction on counts 1, 3 and 5 of the instant case cannot stand because the only person he could have aided and abetted under 18 USC 2 was Niederberger who was acquitted of these charges.

This same matter was raised by the defendant in a motion to dismiss, the argument being made that there is a logical inconsistency in convicting Standefer of aiding and abetting Niederberger in the receipt of illegal gratuities under 26 USC 7214(a)(2) when Niederberger was acquitted of these charges.

It should be obvious of course that juries' verdicts need not be consistent. It is no grounds for acquittal that a defendant is acquitted on certain charges and convicted on others when he logically might have been convicted on all of them. It is the jury's prerogative to make such determinations.

What this court said with respect to the motion to dismiss is apropos of the same argument which is now presented here.

"The court holds that this is not grounds for dismissing Counts 1, 3 and 5 of the instant indictment. The Rule in this Circuit with respect to such matters was originally laid down in US v. Klass 166 F 2d 373 (3d cir 1948) with respect to charges of aiding and abetting wherein the court stated 'it is not necessary that the actual principal be tried or convicted nor is it material that the actual principal has been acquitted. The aider and abettor may be charged with the substantive offense and each participant must stand on his own two feet.'

"More recently this matter was considered by the court of Appeals for this Circuit in US v Bryan, 483 F 2d 88, (3d cir 1973). In that case, the co-defendant principal was acquitted because of lack of criminal intent but nevertheless it was held that the aider and abettor could be convicted. The court pointed out that a crime may be performed through the use of an innocent

dupe. The court pointed out that semantic difficulties previously existing were eliminated from the Federal Criminal Code by the passage of 18 USC 2 which makes aiders and abettors punishable as principals. The court rejected the argument that an aider and abettor is guilty only if the principal is also convicted. The fact that the alleged principal may have been acquitted because of lack of criminal intent does not prevent the conviction of the aider and abettor. Another example would be where one entrusts the actual transportation of stolen goods across the state line to an innocent truck driver or bus driver who is unaware of the contents of a package entrusted to him. In such case the driver would be innocent because of lack of criminal intent but nevertheless the person who entrusted the goods to him and knew the contents of the package would be guilty as an aider and abettor and hence a principal."

We do not know on what grounds Niederberger may have been acquitted on counts 1, 2, 3, and 4. The jury may have determined that the evidence did not show willful intent on his part or may have concluded that the evidence as to these outings was insufficiently clear as furnishing a basis for conviction or for any other reason. This is no reason for acquitting Standefer of the charge of extending these gratuities and supplying these expensive golf outings to Niederberger.

It is obvious that 18 USC 2 was passed to avoid some of the logical inconsistencies now raised by the defendant with respect to aiding and abetting. The purpose was to make it clear that a person who aided and abetted was a principal. The words are not merely aiding and abetting but the Act also covers counseling, commanding, inducing or procuring the commission of an offense and in subsection (b) causing an act to be done which if directly performed by him or another would be an offense against the United States.

For authority that the verdict of a jury need not be consistent and by the same token the verdicts of two juries except where the same person has been acquitted of the same offense in a prior trial in which case plea of once in jeopardy would prevent him from being tried again, see US v. Cindrich, 241 F 2d 54 (3d cir 1957). The above also disposes of reason No. 6 of the grounds for new trial.

(3) Quid Pro Quo - Correctness of Tax Returns
Better Working Atmosphere

Reaons 8, 9, 11, 16, 18, 20, 24 of Motions for New Trial

The matters covered by these grounds for new trial were raised to a considerable extent by the

defendant in motion to dismiss for failure to allege facts constituting a criminal offense which was denied prior to trial. The defendant again seeks to confuse the gratuities section of 18 USC 201(f) with the bribery sections 201(b) and 201(c)(1). The court at that time agreed with Judge Snyder's ruling in the Niederberger case to the effect that a specific quid pro quo need not be shown and that all that need to be shown was that the agent accepted, received or agreed to receive something of value for or because of an official act to be performed or to be performed by him and it was for the jury to determine whether the trips and other gratuities were things of value received by him by reason of official acts.

Such instructions were affirmed by the Court of Appeals in U.S. v. Niederberger, supra, where the court held that the statutes in question 18 USC 201(g) (which is similar to 201(f)) and 26 USC 7214(a)(2) proscribe the receipt of a public official of a gratuity except where specifically permitted under the law for the performance of an official act or duty. It was argued that it must be shown that the agent received the golfing trips or outings in return for some specific identifiable

act which he performed or was to perform in the future. It was pointed out, however, that 201(c)(1) provided for prosecution of a public official if he "corruptly accepts, receives or agrees to receive anything of value for himself in return for (1) being influenced in his performance of any official act." The court held it was clear that 201(c)(1) required a quid pro quo but that 201(g) did not. See US v. Brewster, 506 F 2d 62 (D.C. Cir. 1974). The same reasoning would apply to 201(b) covering givers of bribes. The court further held it was unnecessary to prove that the gratuities received by a public official were in any way generated by some specific identifiable act performed or to be performed by the official and that a quid pro quo was simply foreign to the elements of a subsection (g) offense. It was sufficient that the gratuities to which he was not legally entitled were given to him in the course of his everyday duties for or because of official acts performed or to be performed by him and where he was in a position to use his authority in a manner which could affect the gift giver. See US v. Alessio, 528 F 2d 1079 (9th cir 1976). It was also specifically held that

neither 201(g) nor 7214(a)(2) required an allegation of proof of a quid pro quo. In footnote #10, the Court of Appeals pointed out that support of this conclusion was also found in citations involving an 18 USC 201(f) offense (as does this case) the payment of a gratuity to a public official, citing US v. Alessio, supra; US v. Umans, 368 F 2d 725 (2d cir 1966) and US v. Irwin, 354 F 2d 192 (2d cir 1965). The court then said significantly

> "It follows that if proof of a quid pro quo is not required under 201(f) it need not be established in a 201(g) prosecution."

By the same token the question of correctness of the tax returns filed by Gulf for these years as finally audited becomes immaterial as it might be under a 201(c)(1) prosecution. This court consistently told the jury that we were not retrying the question of the correctness of these returns and that we were not retrying the whole case of the tax liabilities of Gulf for these years and whether Standefer had succeeded in influencing Niederberger to alter his reports was immaterial. The same is true of the argument in Reason 11 of the motion for new trial that the government had to show what year the gratuities were applied to and this also

disposes of the defendant's argument that if his purpose was to create a better working atmosphere by providing these expensive junkets for the case supervisor, then he could not be guilty of a violation of the statute. See also US v. Cohen, 287 F 2d 803 (2d cir 1967).

It is apparent from the above discussion and what the Court of Appeals decided in Neiderberger that creation of a better working atmosphere by giving of expensive presents and trips to an Internal Revenue Agent is exactly what was proscribed by Congress in enacting these statutes.

At pages 18 and 24 of the court's charge, this court did leave to the jury the question as to whether these things were given to Neiderberger by the defendant Standefer and by Gulf as a matter of friendship or for social purposes only. If so, then they should acquit the defendant. At page 24 the jury was told:

> "On the other hand it is the defendant's contention that these trips and vacations were matters of friendship and social affairs in accordance with the accepted practices in the industry and in business."
>
> "Further his contention is that nothing was discussed on these trips concerning

the audits or other business in the Gulf Oil Corporation.

"He contends that he was not knowingly engaged in giving Niederberger compensation not authorized by law for the performance or non-performance of any duty performed or to be performed in connection with the audit of these returns or aiding and abetting Neiderberger in receiving compensation unauthorized by law for the performance of any duties.

"Defendant contends that he did not knowingly or willfully violate the law and does not believe he did so. He contends that he is not guilty of any of these charges."

The jury was told that if this was the purpose of the payment for these trips, then they should acquit the defendant. The jury apparently came to the conclusion that this was not the case and were justified from the evidence in making such a finding.

Under these instructions the court finds that it adequately presented defendant's contentions to the jury which if the jury had believed them would have acquitted him but the jury did not so find.

(4) The Matter of Intent

Reasons No. 7, 18, 19 and 20 of motion for new trial

In the 7th paragraph of the motion for new trial, the defendant contends the court erred that in denying defendant's request for instruction No. 9. Request No. 9 reads as follows:

"9. An essential element which must be charged and proved by the government beyond a reasonable doubt in all nine counts of the indictment is the state of mind of the defendant F. W. Standefer and as to this essential element it is necessary that the government prove beyond a reasonable doubt that Standefer acted with a corrupt motive, improper design, unlawfully, wilfully and knowingly. If you find that at the time the alleged acts were committed Standefer was misled by Internal Revenue Service regulations, failure of Internal Revenue Service officials to issue directives that entertaining Internal Revenue Service agents was improper or illegal, as well as the conduct of presidents, vice presidents, and Congressmen and officials in other agencies of the government to accept trips and entertainment, then you could find that the defendant, F. W. Standefer, did not have the necessary criminal intent and therefore it would be your duty, as a juror, to find the defendant

> 'not guilty'. If you find that the government has proved this essential element beyond a reasonable doubt, then it would be your duty as a juror to find the defendant 'guilty'."

The vice of this instruction is that it demands that the government prove beyond a reasonable doubt that Standefer acted with a corrupt motive. It further goes on to discuss internal revenue service regulations or failure to issue regulations and the conduct of presidents, vice presidents and congressman in accepting trips and entertainments. These latters matters will be dealt with later in this opinion and suffice it to say that the court determined that such matters were irrelevant to the guilt or innocence of the defendant and still adheres to that determination.

The government in its argument has well stated that these attempts by the defendant to interject the question of corruption into this case are misplaced and another illustration of defendant's attempts to twist and turn this case into one of bribery which it is not. Defendant persisted during the trial of this case in confusing

18 USC 201(f), the gratuities section with 18 USC 201(b), the bribery section which prohibits the giving of value to a public official to influence any official act or to abet or aid in committing any fraud on the United States.

That corrupt motive does not enter into a prosecution under 201(f) or 201(g) it has been clearly held in many cases. See US v. Barash, 412 F 2d 26 (2d cir 1969) where the court said:

> "Although criminal intent is a necessary element for conviction under the gratuity counts, no specific intent is required. In this case, accepting Barash's version of the facts, the payments were received by auditors 'otherwise than as provided by law for the proper discharge of official duty,' as provided for in §201(b). In measuring intent, it matters not whether the payments were made because of economic duress, a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit."

(Footnote 7 in Barash points out that substantially identical language is contained in 7214(a)(2). The court further said

> "The concluding point for our consideration is Barash's contention that it was error to

submit to the jury the counts under 18 USC former §201 as well as the counts under 26 USC §7214(a)(2), thus permitting the jury to convict on both counts. In the recent decision of US v. Cohen, 287 F 2d 803 (2d cir 1967), we made clear the differences in the requirements for conviction under these sections:

"The aiding and abetting counts, unlike the bribery counts, require proof that the Internal Revenue Agent received a fee, not prescribed by law, for the performance of his duty. The bribery counts, unlike the aiding and abetting counts, require proof of a specific corrupt intent to influence official action. From a time standpoint alone bribery required that money be given or promised with the intent to influence an official's decision before the decision is readhed. id. at 805."

Again, in US v. Alessio, supra, the court said:

"In US v. Barash, 412 F 2d 26 (2d cir. 1969), cert den 396 US 832, 90 S Ct 86, 24 L Ed 2d 82 (1969), the Court of Appeals for the Second Circuit held it was a violation of Section 201 (f) for a tax attorney representing clients in audits before the IRS to make payments to tax auditors, 'whether the payments were made because of economic duress, a desire to create a better working atmosphere, or [in] appreciation for a speedy and favorable audit." 412 F2d at 29. Clearly, the intent necessary to establish a violation of this section may

be present whether or not there was an agreement between appellant and Santiago regarding particular acts Santiago had performed or would perform. To support the jury's verdict the evidence must show that something of value was given 'a public official . . . for or because of any official act performed or to be performed by such public official. . ." 18 U SC §201(f). An 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.' 18 USC §201(a)."

In reason No. 18 which has already been dealt with, defendant states: "The court in stating that intent may not be proved directly but may be proved by surrounding circumstances called to the jury's attention a proper factfinding function". It then goes on to claim that the question of the audits should however be considered in relation to the question of intent. This has already been dealt with.

In reason 19 the defendant complains of the action of the court answering a question by the jury during deliberations. The jury question read as follows:

"Is intent to be considered in any of the nine counts. Thank you."

The defendant contends that the court should simply have answered "Yes". This overlooks the fact the question asked whether intent was to be considered in any of the nine counts. To have simply answered "Yes" would have left the jury mystified as to which of the nine counts intent applied to. The court therefore went on to review the prior instructions in the main body of the charge with respect to intent as follows:

"With respect to each of these counts, it is necessary that you find that the defendant did intend to give gratuities or vacation trips or what-have-you to Niederberger for the purpose or because of an official act to be performed -- performed or to be performed by Niederberger and as I have told you, it is necessary that you find that he did this not inadvertently or negligently or by reason of mistake, but intending to give these things to the Internal Revenue Agent for or because of official acts.

"For instance, with respect to the 201(f) charges, I told you it was necessary for the government to prove that the defendant committed the act of giving, offering or promising knowingly and purposefully and not through misunderstanding, inadvertence or for some other innocent reason, and that the

gift was with the purpose or state of mind of giving a thing of value for or by reason of the official act performed or to be performed by the agent; and I told you on the other hand that if this had nothing to do -- if giving these gratuities had nothing to do with the giving of things of value to a public official, but on the contrary were given as a matter of firendship and for social purposes only, then you should acquit him; and this is the thing you have to decide. This is a very difficult thing and it is an important thing; and in these cases, with respect to all of these counts, for the reason that I told you, intent is something that you can't prove directly. Someone said they would have to crawl into somebody else's mind, and of course, we know we can't do that, and there is no way of even putting a machine on somebody else's mind and finding out what he intends.

"But what we say is it need not be proved directly, but you may infer a defendant's intent from the surrounding circumstances, and therefore you may consider any statements made or done or acts committed or all the other facts and circumstances of the case in trying to determine what was his intention, what was his purpose to do by extending these gratuities, if you find that he did.

"We further told you on the other charge that you had to find that he did these acts willfully or knowingly, willfully and

purposely, and not because of mistakes, inadvertence or accident; and I think that is the problem."

After this was done, the foreman asked another question (p. 48):

THE FOREMAN: The only other question, Your Honor, that I may bring up that could be in some of the people's mind, and yet we haven't discussed it, is, there was a point that was brought up, if I remember correctly, and this is in relation to the defendant's intent.

If there is any doubt whether the intent was there or not, in other words, in so many words, if you are not sure one way or the other, then you are supposed to give your attention towards the acquittal?

THE COURT: Well, that's what I said early in my charge, that if you consider that the evidence permits either of two conclusions--

THE FOREMAN: Right.

THE COURT: -- why, then the government has not proved its case beyond a reasonable doubt.

You have got to determine that the government has proved beyond a reasonable doubt that these gratuities, vacation trips and what have you were extended for the purpose or on account of the official acts to be performed by the defendant, and not on account of friendship or for mere social purposes.

THE FOREMAN: Thank you, sir.

THE COURT: That is the crux of the matter, what was the purpose in doing this?

MR. McKAY: Your Honor, could I approach sidebar?

THE COURT: Yes.
(At sidebar, out of the hearing or the jury)

MR. McKAY: Your Honor, I think the jury must be informed that if the intent is to relax business atmosphere or good will, that this is a sufficient intent in the 201(f) counts. I think that is confusing. I think also the official act, it must be stated that the official act is the audits.

MR. GONDELMAN: You have said that already, Your Honor. I object to the repeating.

THE COURT: I have said that.

MR. GONDELMAN: Thanks.

(In open court)

THE COURT: It has been suggested that I should inform you, and I think I have, I think you all understand, that the official act we are talking about here is the audit of the Gulf Oil Corporation returns in which this man was the Large Case Manager.

On the other hand, I have also pointed out to you that these statutes do not require

> that corrupt intention which goes for bribery case; and further I informed you that it is sufficient if these payments were paid for any reason in connection with the audit, because of a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit, and that any of these would be purposes that whether the returns were correct or not is not relevant in this case. But it has to be for the purpose of giving these things to the agent on account of the audit of these returns and his position with respect thereto.
>
> All right, the jury may retire for further deliberations.

In view of the fact that the jury had focused on this particular aspect of the case, it was the feeling of the court that it was entitled to have the instructions on this question reviewed at some length so as to give a complete answer to the question. The court finds no abuse of discretion in doing this.

This also deals with reason No. 20 with respect to the proof of intent by circumstantial evidence where again the court repeated that intent may be determined from all the facts and circumstances of the case which the defendant in reason No. 18 of the reasons for new trial concedes was proper.

(5) Activities in the Open.
Reason No. 10.

In reason 10 of the motion for new trial defendant argues that the court erred in refusing No. 10 of defendant's requests for instructions that the jury should consider the fact that the defendant engaged in activities with respect to Niederberger in the open and in public places and that this therefore negates any evidence of wrongdoing or concealment. The point in question is as follows insofar as pertinent here:

> "I charge you that as a part of circumstantial evidence you may find the defendant F. W. Standefer lacked criminal intent by reason of the fact that the entertainment of the alleged principal Cyril J. Niederberger was done openly and in public places. Which factor you may find negates any evidence of wrongdoing or concealment."

The motion as filed refers to the fact "Since clandestine meetings are argued by the government and given in instructions by the court to juries as evidence of guilt". The defendant has not pointed out in his brief any place where in this court's charge such an instruction was given to the jury.

If such an instruction had been requested, it would have been refused as argumentative and for the same reason, defendant's request No. 10 was refused. The parties were permitted to argue such matters to the jury but the court considers it wrong for the court to engage in such arguments in the court's charge. If the court were to have given such an instruction it might well have been followed with the caution "of course, it has often been said that no one is so alone as in a crowd" referring to the fact that in the presence of a crowd of people a certain defendant may appear anonymous.

(6) Affirming Government's Additional Point No. 1.
Reasons 12, 23 of reasons for new trial.

The court did go over on the day before the requests for instructions to the jury as filed by both parties and announced its proposed action thereon in accordance with Rule 30. The government particularly was told to take its requests back and put them in proper form since what had been submitted was a copy of its requests for charge in the case of US v. Niederberger, supra. This the government did and the next morning submitted revised requests for charge. There was also submitted an

additional point No. 1. This the government counsel had given to defense counsel in advance of argument (see pp. 36, 37 Tr. of Charge) and defense counsel made no request for further information from the court as to its proposed disposition of point 1. It has been held that a failure of the court to inform counsel before argument of action on written request is harmless if counsel makes no request for the information. See 1 Devitt and Blackmar Fed Jury Prac and Instructions §7.02. In any event the court did not give new point No. 1 as requested but instead gave it with a modification as set forth at page 27 of the transcript of the charge as follows:

"The first will be affirmed with a modification. If you find beyond a reasonable doubt that the defendant committed each element of the offense charged, then you may find the defendant guilty. You may so find even though you also find that such evidence is widespread in the industry, where industry custom and practice cannot serve to repeal the criminal law. That point is affirmed with the modification, that these facts may be considered by you in determining what were his motives or purposes in connection with these matters."

It will be noted that the modification was that these facts (evidence that the practice was

widespread in industry) may be considered by a jury in determining the motives or purposes of the defendant. This gave the defendant perhaps more than he was entitled to since it permitted the jury to consider the evidence which had crept into the case that entertainment of government agents was a widespread practice and at one point the defendant himself had blurted out on the stand that presidents and congressmen did not hesitate to accept such entertainment. The result is that with the modification the jury had the position contended for by defendant before it. As a matter of fact this had already been conveyed to the jury on pages 24 and 25 of the main charge where it was stated that "It is the defendant's contention that these trips and vacations were matters of friendship and social affairs in accordance with the accepted practices in the industry and in business.

It has been pointed out that Professor Moore (8 A Moore's Fed Prac 30.03(2) 1976) has stated with respect to failure of compliance with Rule 30 that " . . . denial of rulings can constitute reversible error only if counsel shows some way in which he was badly impeded or misled in making his summation." This the defendant has not shown. He did argue to

the jury the matters covered by this point and the jury was told that they could consider these matters in determining the defendant's intent.

It cannot be doubted that widespread violation of the law by others can furnish no excuse for a particular defendant ignoring the law since otherwise the law would be considered repealed by failure or inability of the government to enforce it in a large number of cases. It cannot be said that a public official who has accepted kickbacks from contractors doing business with the state or government can claim that this is a way of life in the United States today and thus have a jury acquit him. The most that can be asked is that the jury consider this along with the other evidence in the case in determining the defendant's intent and this the jury was permitted to do.

(7) Government's Instruction No. 12
Reason for New Trial No. 13

The court affirmed government's request for instruction No. 12 as follows (p. 26 Tr of Charge):

> "No. 12 will be affirmed. I charge you as a matter of law that the vacation trips the defendant gave, offered or promised to give

are not authorized by law to be given to IRS employees for the performance of IRS duties. With a slight modification, it is affirmed."

The slight modification referred to was the insertion of the word "trips" after the word vacation.

Defendant complains that this was argumentative and should not have been given. The fact is that this is a correct statement of the law. There is nothing in the law which includes as compensation of an Internal Revenue agent golf outings at the expense of a taxpayer under audit. When taken in conjunction with the balance of the charge of the court summing up defendant's contentions with respect to the purpose of these trips it can hardly be said that the defendant was prejudiced in any way by giving this instruction or that the jury could have been misled.

(8) Interference with Calling of Defense Witness.
Reasons 14, 15 and 25.

In reason for new trial No. 14 the claim was made that the court erred in refusing to charge the jury that the agent Cyril J. Niederberger was available as a witness only to the government and not to the defendant and therefore the jury could draw unfavorable inference from the failure of the government to

call him and claim is made that the court interfered with the calling of Niederberger when it did not require the government to ask immunity for him in case he should be called to testify as a defense witness. The defendant places reliance upon US v. Morrison, 535 F 2d 223 (1976).

In Morrison it appeared that the government had improperly called a defense witness into an assistant U. S. Attorney's office and threatened her with prosecution under state law if she testified for the defendant. The witness did take the stand and testified as to certain matters and also claimed the protection of the Fifth Amendment and refused to testify as to others. The Circuit held this was an impermissible interference with the defendant's right to call witnesses in his favor and in view of the particular circumstances indicated that if the witness were called at another trial the government should be directed to apply for immunity for the witness or else dismiss the indictment.

In the instant case, nothing like this occurred. The defendant wanted leave to call Niederberger, the agent to whom the gratuities and outings were given as testified in this case, as a defense witness claiming he had exculpatory testimony to give with

respect to Standefer, but the defense wanted the court to oefuse the government leave to cross examine him as to his conviction and to require the government to grant him immunity if he was called. Niederberger never was called in this case and we are left in the dark as to whether he would or would not have claimed the protection of the Fifth Amendment if called. There is no evidence that threats were ever made to Niederberger informing him that he would be prosecuted if he did testify for the defendant. We do not know whether his testimony would have been exculpatory or not.

The court refused to limit the government in its cross examination of Niederberger and to require the government to forego its right on cross examination to ask him if he had not been convicted of a felony to wit receiving as a government officer compensation not authorized by law. This would certainly have affected his credibility and the court had no right to refuse the government the right to cross examine on such a matter. See Rule 609 Fed Rules of Evidence.

Nor did the court have any right to require the government to apply for immunity for Niederberger.

The record indicates that when this issue arose the court indicated that it would well understand that Niederberger's counsel might seek to have the government grant him immunity particularly in light of the fact that his appeal was then pending before the court of appeals but the court held it had no power to require the government to apply for such immunity. See US v. Berrigan, 482 F 2d 171 at 190 (3d cir. 1973); Earl v. US, 361 F 2d 531 (D.C. Cir. 1966) (Opinion by then Circuit Judge now Chief Justice Burger.)

The record also shows that when this request for the instruction in question was made at page 32, the court refused the request since Niederberger was no longer a government agent and hence was available to either party to be called. There is no showing that if called he would have taken the Fifth Amendment or that if he had testified he had any information of importance which would have exculpated Standefer or whether he might not on direct or cross examination have inculpated him.

The same is true with respect to the refusal of the court to limit cross examination of other internal revenue agents whom the defense proposed to call. The record shows that the defendant proposed to call these agents who had been discharged

by the government as the result of their own participation in these matters and the government proposed to cross examine them as to whether or not they had been discharged. The court ruled that this was certainly proper cross examination to attack their credibility, to show that they had hostility towards the government as a result of their discharges. Certainly the court has no right to limit the government or any other counsel from cross examination of a witness to show hostility.

The defendant further claims he should then have been entitled to show that they were improperly discharged. The court ruled that he would permit redirect examination to show that the witnesses did not think they had properly been discharged but that we did not propose to open up the whole question of the reasons for discharge in each case, that this raised collateral matters and would unduly confuse the issues in this trial if we had to retry each one of their discharge cases. It is submitted that this ruling was proper under the Federal Rules of Evidence, Rules 403 and 611. The agents never were called as witnesses and hence we do not know what exculpatory testimony if any they might have given to help the defendant Standefer.

(9) Duplicitousness

The defendant complains in reason No. 17 for a new trial of the alleged duplicitiousness of the counts in the indictment which alternate between charges of violation of 7214(a)(2) and 201(f) invovling the same incidents. The question of duplicitiousness was dealt with by the circuit in the opinion filed May 5, 1978 in the Niederberger case at page 7 and it is not necessary again to deal with this subject. These are separate statutes charging separate offenses in the disjunctive and the government was within its rights in filing separate counts as to these offenses and there is no reason why the jury could not convict on each one of these counts in view of the evidence presented.

(10) Other Instances of prosecutorial Misconduct and Grounds of Mistrial Reason 21

The defendant has filed a shotgun charge in paragraph 21 of his motion for new trial seeking to bring up all the alleged errors committed by the court throughout this lengthy and complicated trial. To the extent that these have been argued or briefed, the court has reviewed the same and it would appear

that insofar as they have not already been dealt with in this opinion they did not rise to the magnitude of such prejudice to the defendant as to warrant mistrial and the court finds there was no abuse of discretion in its action.

An appropriate order will be entered denying defendant's motions.

/s/ William W. Knox

U. S. District Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
vs.	)	Criminal No. 77-139
F. W. STANDEFER	)	

ORDER

AND NOW, to-wit, May 24, 1978, for reasons set forth in the accompanying opinion, IT IS ORDERED that defendant's motions in arrest of judgment or in the alternative for a new trial be and the same hereby are denied.

IT IS FURTHER ORDERED that a presentence report be prepared and the defendant appear for sentence before the court on Tuesday, June 27, 1978, at 9:15 a.m.

/s/ William W. Knox

U.S. District Judge

CC:

U.S. Atty
633 U.S. Courthouse 15219

Harold Gondelman, Esq.
1018 Frick Bldg 15219

Supreme Court, U.S.
FILED
FEB 7 1980
MICHAEL RODAK, JR., CLERK

A P P E N D I X

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-383

F. W. STANDEFER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

Petition for Certiorari filed September 6, 1979
Petition for Certiorari granted January 7, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 77-139 CRIMINAL

UNITED STATES OF AMERICA

vs.

F. W. STANDEFER

Docket Entries

1977	
June 15	A True Bill
June 15	Indictment filed
June 15	Request of U. S. Atty. for summons for appearance of Deft. by June 30, 1977 to file appearance and post $500.00 OR bond.
June 15	Summons issued
June 21	Notice of Arraignment and Local Rule 24 Conf. of counsel to be held July 7, 1977 at 10:00 before Mag. Mitchell.

Docket Entries

June 22	Summons returned executed; served by certified mail on Deft. Standefer on 6/20/77 sent 6/15/77.
June 24	Memorandum filed re: correct address of defendant which is 1000 Grandview Ave., Apt. 203, Pgh., Pa. 15211
June 27	Praecipe for Appearance of Harold Gondelman, Esq. filed on Behalf of Deft. F. W. Standefer.
June 27	Deft. posts $500.00 OR bond.
July 7	Motion for enlargement of time to file pretrial motions and proposed order filed by deft.
July 7	Deft. appears before Magistrate Mitchell and pleads NOT GUILTY
July 8	Order scheduling Pretrial conf. for Aug. 1, 1977 entered (Knox, J.)
July 8	Order of Court entered directing that the Deft. F. W. Standefer is granted leave to file pretrial motions to Aug. 1, 1977 (Marsh, J.)
July 18	Motion for continuance filed by deft.
July 18	Motion to dismiss filed by deft.
July 20	Order of court entered directing that an arg. on Defts. motion for continuance

Docket Entries

	and motion to dismiss is fixed for Aug. 1, 1977 at 10:00 before Judge Knox (Knox, J.)
Aug. 1	Pretrial held and arg. on motion for continuance before Knox, J. Memo filed (Rep. C. Shuff)
Aug. 2	Order entered dtd 8/1/77 that briefs in connection with all pending motions except mot for add. premptory challenges & motion for continuance which was argued 8/1/77 be filed as follows: movants by 8/15/77; respondents by 8/24/77; further ordered that arg. on same is scheduled for 8/26/77 at 9:15 A.M. together with further pre-trial conf.; further ordered that any additional memoranda or material with respect to the motion for continuance be filed by 8/15/77; failure to file timely briefs unless extension is secured will result in appropriate sanctions against the delinquent party (Knox, J.
Aug. 8	Waiver of Speedy Trial Act filed by Deft.

Docket Entries

Aug. 24	Order of Court entered directing that motions for continuance are denied. Further ordered that this case is fixed for trial on Nov. 28, 1977 at 10:00 at which time counsel are directed to proceed with the empanelling of a jury (Knox, J.)
Aug. 29	Hearing on All Pending Motions held before Judge Knox. Memo filed. Reporter: C.R. Shuff Concluded C.A. V
Sept. 23	Order of court entered dated Sept. 20, 1977 directing that the motions of defts for dismissal of counts 1, 3 and 5 of the indictment is denied (Knox,J.)
Sept. 23	Order of court entered directing that the U.S. Atty. respond within 7 days to second motion for continuance (Knox, J.)
Sept. 23	Memorandum denying motion to dismiss indictment as constituting arbitrary, capricious and unconstitutional selective prosecution filed (Knox, J.)
Sept. 23	Order of court entered, dated Sept. 20, 1977, directing that the motion of Deft. Standefer to dismiss indictment is denied.

Docket Entries

Sept. 23	Memorandum denying defts' motions to dismiss: acquittal of Agent Neiderberger filed (Knox, J.)
Sept. 28	Memorandum re: continuance of case filed (Knox, J.)
Sept. 28	Order of court entered directing that the second motion for continuance filed by defts is denied (Knox, J.)
Sept. 28	Memorandum re: severance of offenses or to elect between the offenses filed (Knox, J.)
Sept. 28	Order of court entered, dated Sept. 27, 1977, directing that the motion to compel to elect or for severance is denied (Knox, J.)
Sept. 30	Memorandum Opinion Motion to Dismiss Multiplicitous Counts filed (Knox, J.)
Sept. 30	Order of court entered, dated Sept. 29, 1977, directing that the motion to dismiss counts 1, 3, 5, 7 and 9 for multiplicity is denied (Knox, J.)
Oct. 11	Order Denying Motion for Bill of Particulars filed (Knox, J.)
Oct. 12	Memorandum Denying Motion to Dismiss for failure to allege facts constituting criminal offense filed (Knox, J.)

Docket Entries

Oct. 12	Order of court entered, dated Oct. 11, 1977 directing that the motion to dismiss for failure to allege facts constituting a criminal offense filed by defts is denied without prejudice to the right of the deft. to raise such contention at trial after the evidence with respect to this matter has been received (Knox, J.)
Nov. 15	Motion ex parte for severance, or, in the alternative, for continuance filed by deft.
Nov. 15	Order entered fixing argument on motion for severance or continuance for 11-21-77 at 9:15 A.M. (Knox, J.)
Nov. 21	Argument on Deft. Standefer's Motion for severance or continuance held before Judge Knox. Memo filed. Reporter: M. Brown. (Motion for continuance denied without prejudice; Motion for severance granted)
Nov. 23	Order of court entered, dated Nov. 21, 1977, directing that the motion for severance is granted and the charges against deft. Gulf Oil Corp. are severed from the charges against deft. F. W.

Docket Entries

	Standefer; further ordered that the motion for continuance is denied and the plea of Gulf Oil Corp. will continue as scheduled on Nov. 22, 1977 in open court (Knox, J.)
Nov. 28	Conference held before Judge Knox. Memo filed. Reporter: M. Brown. (Motion for continuance presented by Deft. Standefer and ruling reserved)
Nov. 28	Motion ex parte F. W. Standefer to conduct individual voir dire of jurors out of the presence of other jurors filed and order of court entered granting same (Knox, J.)
Nov. 29	Proposed Questions ex Parte Deft., F.W. Standefer, for voir dire examination of Jurors filed.
Nov. 29	Additional Questions ex parte F. W. Standefer for voir dire examination of jurors filed.
Nov. 29	Jury Selection time: 11/28/77-4 hours and 30 minutes 11/29/77-4 hours Total: 8 hrs. 30
Nov. 29	Jury Trial opens before Judge Knox

Docket Entries

	and a jury as to Deft. Standefer
Nov. 30	Jury Trial continues
Dec. 1	Conference hld before Judge Knox. Memo filed. Reporter: Marilyn Brown (Oral motion for mistrial filed by deft. denied)
Dec. 1	Jury Trial Continues
Dec. 2	Jury Trial Continues
Dec. 5	Jury Trial Continues
Dec. 6	Jury Trial Continues
Dec. 7	Jury Trial Continues
Dec. 8	Jury Trial Continues
Dec. 9	Jury Trial Continues and Concludes. Memo filed. (Reporter: Marilyn Brown)
Dec. 12	Jury returns verdict of GUILTY as to counts 1 through 9 on Dec. 9, 1977. Verdict sheet filed.
Dec. 12	Motion for Continuance filed and order of court entered, dated Nov. 29, 1977 directing that the mtn. to continue is DENIED (Knox, J.)
Dec. 12	Jury Question filed.
Dec. 12	Deft's Requests for Instructions to the jury filed.
Dec. 12	United States Additional Points for Charge filed.

Docket Entries

Dec. 12	Points for charge filed by Pltf.
Dec. 12	Motion in arrest of judgment, or, in the alternative, for new trial filed by Deft. Standefer with proposed order of court.
Dec. 15	Supplemental Motion in Arrest, Or, In the Alternative, For New Trial filed by Deft. Standefer.
Dec. 20	Order of court entered directing that the Deft's brief on motion in arrest of judgment etc. be filed on or before Jan. 20, 1978; respondent's brief to be filed on or before Jan. 30, 1978; further ordered that arg. is set for Feb. 1, 1978 at 4:00 P.M. on the motion (Knox, J.)
1978	
Jan. 10	Order of court, dated Jan. 9, 1978 for payment of juror expenses entered (Knox, J.)
Jan. 16	Excerpt from Proceedings held Nov. 28, 1977 before Judge Knox filed. (Reporter: Marilyn G. Brown)
Jan. 31	Motion filed and order of court entered, dated Jan. 30, 1978, directing that the government is granted an additional one

Docket Entries

	day from Jan. 30, 1978 to Feb. 1, 1978 in which to file Brief in Opposition to Deft. F. W. Standefer's Motion in Arrest of Judgment, or in the Alternative, for a new trial (Knox, J.)
Feb. 2	Hearing on motion for new trial held before Knox, J. Memo filed (Rep. M. Brown)
Mar. 15	Excerpt from proceedings held Dec. 5, 1977 before Judge Knox filed. (Reporter: Marilyn G. Brown)
May 24	Opinion of Knox, J. re motions in arrest of judgment or in the alternative for a new trial filed.
May 24	Order entered directing that deft's motions in arrest of judgment or in the alternative for a new trial are denied; presentence report to be prepared & deft. appear for sentence on 6-27-78 at 9:15 A.M. (Knox, J.)
May 25	Notice of Sentence to be held June 27, 1978 at 9:15 A.M. Before Judge Knox filed.
June 14	Notice rescheduling sentence to June 13, 1978 at 9:15 A.M. before Judge Knox filed.

Docket Entries

June 19	SENTENCE: Imprisonment of 2 yrs on condition that he be imprisoned for a period of 6 months and the remainder of imprisonment suspended and deft. placed on probation for 2 yrs. after his release from incarceration. The conditions of probation are 1) he obey all local, state and federal laws 2) he comply with the rules and regulations of the probation office 3) he pay a fine of $2,000 in installments as agreed upon with the probation office. This as to Count 1. The same sentence is imposed on cts. 2, 3, 4, 5, 6, 7, 8 and 9. The terms of imprisonment to run concurrently, but a separate fine of $2,000.00 is imposed on each count, making a total fine of $18,000.00; present bond continued pending appeal (Knox, J.) CC issued (Reporter: M. Brown)
June 19	Notice of Appeal filed by Deft.
June 19	Copy of Notice of Appeal and cover letter mailed to U. S. Court of Appeals along with a copy of the Docket Entries; copy of appeal and cover letter to U.S.

Docket Entries

	Atty.; copy of cover letter to Deft's counsel; copy of Appeal to Judge Knox
June 26	Original record and exhibits mailed to U. S. Court of Appeals

Indictment

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 77- CRIMINAL
	)	
GULF OIL CORPORATION	)	(18 U.S.C.§2
F. W. STANDEFER	)	18 U.S.C. §§201(f) and 2
JOSEPH FITZGERALD	)	26 U.S.C. §7214(a)(2))

The grand jury charges:

From on or about May 17, 1971, and continuing until on or about July 17, 1971, at Pittsburgh, in the Western District of Pennsylvania, and elsewhere, the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH FITZGERALD, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was Case Manager for the audit of GULF OIL CORPORATION income tax returns for the years 1959, 1960, 1961, 1962, 1963, and 1964, in unlawfully and knowingly, receiving a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue agent; that is to say, on or about May 17, 1971, Defendants, GULF

OIL CORPORATION, F. W. STANDEFER and JOSEPH F. FITZGERALD, caused a reservation to be made, and furthermore, caused to be mailed a $50.00 deposit, for Cyril J. Niederberger, and other members of his family for a vacation at the Beachcomber Lodge and Villas, Pompano Beach, Florida, from July 11, 1971 until July 17, 1971, and Cyril J. Niederberger together with members of his family did travel in interstate commerce from Pittsburgh, Pennsylania, to Pompano Beach, Florida, and did stay at said hotel from July 11, 1971 to July 17, 1971, on which date the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, paid the balance due on the motel bill in the sum of $306.80.

In violation of Section 7214 of the Internal Revenue Code; 26 United States Code 7214(a)(2) and Section 2 of Title 18, United States Code.

SECOND COUNT

The grand jury further charges:

On or about January 18, 1973, at Pittsburgh, in the Western District of Pennsylvania, the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and

JOSEPH F. FITZGERALD, did unlawfully and knowingly, directly and indirectly, promise, offer and give things of value, to wit, a vacation for Cyril J. Niederberger at Miami, Florida, which included, among other things, the following: an airfare ticket, lodging at the Doral Country Club, meals, drinks, rental car fees, and golf outing fees, totaling the approximate amount of $445.16, to Cyril J. Niederberger, who at the time was a supervisory United States Internal Revenue agent, in particular, Case Manager of the Internal Revenue Service for the audit of GULF OIL CORPORATION's income tax returns, the above things of value being promised, offered and given otherwise than as provided by law for the proper discharge of Cyril J. Niederberger's official duties, for and because of official acts performed and to be performed by him, namely, the audit of the 1965, 1966, 1967, 1968, 1969 and 1970 income tax returns of the GULF OIL CORPORATION.

In violation of Sections 201(f) and 2 of Title 18, United States Code.

THIRD COUNT

The grand jury further charges:

On or about January 18, 1973, at Pittsburgh, in the Western District of Pennsylvania, the

Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was at the time Case Manager for the audit of the GULF OIL CORPORATION income tax returns for the years 1965, 1966, 1967, 1968, 1969, and 1970, in unlawfully and knowingly, receiving a fee, compensation, and reward, to wit, a vacation for Cyril J. Niederberger at Miami, Florida, which included, among other things, the following: an airfare ticket, lodging at the Doral Country Club, meals, drinks, rental car fees, and golf outing fees, totaling the approximate amount of $445.16, which were not prescribed by law for the performance of his duties as an Internal Revenue Agent.

In violation of Section 7214(a)(2) of Title 26, United States Code and Section 2 of Title 18, United States Code.

FOURTH COUNT

The grand jury further charges:

On or about August 30, 1973, at Pittsburgh, in the Western District of Pennsylvania, the

Defendants, GULF OIL CORPORATION and F. W. STANDEFER, did unlawfully and knowingly, directly and indirectly, promise, offer and give things of value, to wit, a vacation for Cyril J. Niederberger and his wife at Absecon, New Jersey, which included, among other things, the following: airfare tickets, lodging at the Seaview Country Club, meals, drinks, and golf outing fees, totaling the approximate amount of $664.71, to Cyril J. Niederberger, who at the time was a supervisory United States Internal Revenue agent, in particular, Case Manager of the Internal Revenue Service for the audit of GULF OIL CORPORATION's income tax returns, the above things of value being promised, offered and given otherwise than as provided by law for the proper discharge of Cyril J. Niederberger's official duties, for and because of official acts performed and to be performed by him, namely, the audit of the 1965, 1966, 1967, 1968, 1969, and 1970 income tax returns of the GULF OIL CORPORATION.

In violation of Sections 201(f) and 2 of Title 18, United States Code.

FIFTH COUNT

The grand jury further charges:

On or about August 30, 1973, at Pittsburgh, in the Western District of Pennsylvania, the

Defendants, GULF OIL CORPORATION and F. W. STANDEFER, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was at the time Case Manager for the audit of the GULF OIL CORPORATION income tax returns for the years 1965, 1966, 1967, 1968, 1969, and 1970, in unlawfully and knowingly, receiving a fee, compensation, and reward, to wit, a vacation for Cyril J. Niederberger and his wife at Absecon, New Jersey, which included, among other things, the following: airfare tickets, lodging at the Seaview Country Club, meals, drinks, and golf outing fees, totaling the approximate amount of $664.71, which were not prescribed by law for the performance of his duties as an Internal Revenue agent.

In violation of Section 7214(a)(2) of Title 26, United States Code and Section 2 of Title 18, United States Code.

SIXTH COUNT

The grand jury further charges:

On or about March 28, 1974, at Pittsburgh, in the Western District of Pennsylvania, the

Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, did unlawfully and knowingly, directly and indirectly, promise, offer and give things of value, to wit, a vacation for Cyril J. Niederberger at Pebble Beach, California, which included, among other things, the following: an airfare ticket, lodging at the Del Monte Lodge, meals, drinks, rental car fees, and golf outing fees, totaling the approximate amount of $690.93, to Cyril J. Niederberger, who at the time was a supervisory United States Internal Revenue agent, in particular, Case Manager of the Internal Revenue Service for the audit of GULF OIL CORPORATION's income tax returns, the above things of value being promised, offered and given otherwise than as provided by law for the proper discharge of Cyril J. Niederberger's official duties, for and because of official acts performed and to be performed by him, namely, the audit of the 1967, 1968, 1969, and 1970 income tax returns of the GULF OIL CORPORATION, Cyril J. Niederberger's investigation conducted in behalf of the Internal Revenue Service of GULF OIL CORPORATION's political contributions, and the submission of an investigative memorandum on March 28, 1974.

In violation of Sections 201(f) and 2 of Title 18, United States Code.

SEVENTH COUNT

The grand jury further charges:

On or about March 28, 1974, at Pittsburgh, in the Western District of Pennsylvania, the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH W. FITZGERALD, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was at the time Case Manager for the audit of the GULF OIL CORPORATION income tax returns for the years 1967, 1968, 1969, and 1970, and who also conducted an investigation in 1974 in behalf of the Internal Revenue Service of GULF OIL CORPORATION's political contributions and, who, on March 28, 1974, submitted an investigative memorandum, in unlawfully and knowingly, receiving a fee, compensation, and reward, to wit, a vacation for Cyril J. Niederberger at Pebble Beach, California, which included, among other things, the following: an airfare ticket, lodging at the Del Monte Lodge, meals, drinks, rental car fees, and golf outing fees, totaling the approximate amount of $690.93, which were not prescribed by law for the performance of his duties as an Internal

Revenue Agent.

In violation of Section 7214(a)(2) of Title 26, United States Code and Section 2 of Title 18, United States Code.

EIGHTH COUNT

The grand jury further charges:

On or about June 16, 1974, at Pittsburgh, in the Western District of Pennsylvania, the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, did unlawfully and knowingly, directly and indirectly, promise, offer and give things of value, to wit, a vacation for Cyril J. Niederberger and his wife at Las Vegas, Nevada, which included, among other things, the following: airfare tickets, lodging at the Desert Inn Hotel, meals, drinks, and golf outing fees, totaling the approximate amount of $1,187.32, to Cyril J. Niederberger, who at the time was a supervisory United States Internal Revenue agent, in particular, Case Manager of the Internal Revenue Service for the audit of GULF OIL CORPORATION's income tax returns, the above things of value being promised, offered and given otherwise than as provided by law for the proper discharge of Cyril J. Niederberger's official duties, for and because of official acts performed and to be performed by

him, namely, the audit of the 1969 and 1970 income tax returns of the GULF OIL CORPORATION, Cyril J. Niederberger's investigation conducted in behalf of the Internal Revenue Service of GULF OIL CORPORATION's political contributions and the submission of an investigative memorandum on March 28, 1974.

In violation of Sections 201(f) and 2 of Title 18, United States Code.

NINTH COUNT

The grand jury further charges:

On or about June 16, 1974, at Pittsburgh, in the Western District of Pennsylvania, the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was at the time Case Manager for the audit of the GULF OIL CORPORATION income tax returns for the years 1969 and 1970, and who also conducted an investigation in 1974 in behalf of the Internal Revenue Service of GULF OIL CORPORATION's political contributions and who, on March 28, 1974, submitted an investigative memorandum, in unlawfully and knowingly

receiving a fee, compensation, and reward, to wit, a vacation for Cyril J. Niederberger and his wife at Las Vegas, Nevada, which included, among other things, the following: airfare tickets, lodging at the Desert Inn Hotel, meals, drinks, and golf outing fees, totaling the approximate amount of $1,187.32, which were not prescribed by law for the performance of his duties as an Internal Revenue agent.

In violation of Section 7214(a)(2) of Title 26, United States Code and Section 2 of Title 18, United States Code.

A True Bill,

_____

FOREMAN

_____

BLAIR A. GRIFFITH
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	No. 77-139 Criminal
vs.	:	
	:	
F. W. STANDEFER, et al.	:	

MOTION TO DISMISS

AND NOW comes the defendant, F. W. Standefer, by his attorney, Harold Gondelman, and moves your Honorable Court to dismiss the indictment for the following reasons:

I.

Counts One, Three and Five of the Indictment Should Be Dismissed Since the Alleged Principal Has Already Been Acquitted of the Same Charges

1. On June 15, 1977, the indictment against this defendant and others was returned.

2. The indictment alleges certain facts and attempts to establish that this defendant did aid

and abet one Cyril J. Neiderberger in violating 26 U.S.C., §7214(a)(2).

3. Count One of said indictment, a copy of which is attached hereto for the convenience of the Court as Exhibit "A", alleges a $50.00 deposit for Cyril J. Neiderberger for vacation at the Beachcomber Lodge and Villas, Pompano Beach, Florida from July 11, 1971 until July 17, 1971, and the payment of the balance due on the motel bill in the sum of $306.80.

4. In a criminal action filed to No. 76-143, Cyril J. Neiderberger was found "not guilty" of the second count of an indictment against him, a true and correct copy of which, for the convenience of the Court, is attached hereto as Exhibit "A-1". Said count against Cyril J. Neiderberger alleges the same dates, times and amounts as having been received by him as principal.

5. Count Three of the within indictment, a copy of which is attached hereto for the convenience of the Court as Exhibit "B", alleges that on or about January 18, 1973, an air fare ticket, lodging at the Doral Country Club, meals, drinks, rental car fees and golf outing fees totaling $445.16 were paid to Cyril J. Neiderberger.

6. Count Four of the indictment at No. 76-143 Criminal, a copy of which is attached hereto for the convenience of the Court as Exhibit "B-1", alleges the same dates, times and amounts as having been received by Cyril J. Neiderberger as principal.

7. Count Five of the within indictment, a copy of which is attached hereto for the convenience of the Court as Exhibit "C", alleges payment on or about August 30, 1973 for a vacation for Cyril J. Neiderberger and his wife at Absecon, New Jersey, including air fare tickets, lodging at the Seaview Country Club, meals, drinks and golf outing fees, totaling $664.71.

8. Count Six of the indictment at No. 76-143 Criminal, a copy of which is attached hereto for the convenience of the Court as Exhibit "C-1", alleges the same dates, times and amounts as having been received by Cyril J. Neiderberger as principal.

9. Since Cyril J. Neiderberger has been acquitted of receiving said funds and Cyril J. Neiderberger is the only named principal, this

defendant cannot, as a matter of law, be found guilty as an aider and abettor since a jury has already found no violation of 26 U.S.C., §7214 (a)(2) by the principal.

WHEREFORE, F. W. Standefer, defendant, prays this Honorable Court to dismiss Counts One, Three and Five of the within indictment for the reasons hereinabove set forth.

* * * *

(Remaining part of motion not here relevant)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)
v.	) No. 77-139 CRIMINAL
GULF OIL CORPORATION	) (18 U.S.C. §2
F. W. STANDEFER	) 18 U.S.C. §§201(f) and 2
JOSEPH FITZGERALD	) 26 U.S.C. §7214(a)(2)

The grand jury charges:

From on or about May 17, 1971, and continuing until on or about July 17, 1971, at Pittsburgh, in the Western District of Pennsylvania, and elsewhere, the Defendants, GULF OIL CORPORATION, F.W. STANDEFER, and JOSEPH FITZGERALD, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was Case Manager for the audit of GULF OIL CORPORATION income tax returns for the years 1959, 1960, 1961, 1962, 1963, and 1964, in unlawfully and knowingly, receiving a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue agent; that is to say, on or about May 17, 1971,

Exhibit "A"

Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, caused a reservation to be made, and furthermore, caused to be mailed a $50.00 deposit, for Cyril J. Niederberger, and other members of his family for a vacation at the Beachcomber Lodge and Villas, Pompano Beach, Florida, from July 11, 1971 until July 17, 1971, and Cyril J. Niederberger, together with members of his family did travel in interstate commerce from Pittsburgh, Pennsylvania, to Pompano Beach, Florida, and did stay at said hotel from July 11, 1971 to July 17, 1971, on which date the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, paid the balance due on the motel bill in the sum of $306.80.

In violation of Section 7214 of the Internal Revenue Code; 26 United States Code 7214(a)(2) and Section 2 of Title 18, United States Code.

SECOND COUNT

The grand jury further charges:

From on or about May 17, 1971, and continuing until on or about July 17, 1971, at Pittsburgh, in the Western District of Pennsylvania, and elsewhere, the defendant, CYRIL J. NIEDERBERGER, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a Supervisory Internal Revenue agent, who was Case Manager for the audit of the Gulf Oil Corporation income tax returns for the years 1962, 1963, and 1964, did unlawfully and knowingly, receive a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue Agent; that is to say, on or about May 17, 1971, the Gulf Oil Corporation made a reservation, and mailed a $50.00 deposit, for the defendant, CYRIL J. NIEDERBERGER, and other members of his family for a vacation at the Beachcomber Lodge and Villas, Pompano Beach, Florida, from July 11, 1971 until July 17, 1971, and defendant CYRIL J. NIEDERBERGER together with members of his

Exhibit "A-1"

family did travel in interstate commerce from Pittsburgh, Pennsylvania, to Pompano Beach, Florida, and did stay at said hotel from July 11,1971, to July 17, 1971, on which date the Gulf Oil Corporation paid the balance due on the motel bill in the sum of $306.80.

In violation of Section 7214 of the Internal Revenue Code; 26 United States Code 7214(a)(2).

THIRD COUNT

The grand jury further charges:

On or about January 18, 1973, at Pittsburgh, in the Western District of Pennsylvania, the Defendants, GULF OIL CORPORATION, F. W. STANDEFER, and JOSEPH F. FITZGERALD, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue Agent, who was at the time Case Manager for the audit of the GULF OIL CORPORATION income tax returns for the years 1965, 1966, 1967, 1968, 1969, and 1970, in unlawfully and knowingly, receiving a fee, compensation, and reward, to wit, a vacation for Cyril J. Niederberger at Miami, Florida, which included, among other things, the following: an airfare ticket, lodging at the Doral Country Club, meals, drinks, rental car fees, and golf outing fees, totaling the approximate amount of $445.16, which were not prescribed by law for the performance of his duties as an Internal Revenue Agent.

In violation of Section 7214(a)(2) of Title 26, United States Code and Section 2 of Title 18, United States Code.

EXHIBIT "B"

FOURTH COUNT

The grand jury further charges:

On or about January 18, 1973, at Pittsburgh, in the Western District of Pennsylvania, the Defendant, CYRIL J. NIEDERBERGER, an officer and employee of the United States acting in connection with revenue laws of the United States, namely a supervisory Internal Revenue agent, who was Case Manager for the audit of the Gulf Oil Corporation income tax returns for the years 1965, 1966, 1967, and 1968, did unlawfully and knowingly, receive a fee, compensation, and reward, which was not prescribed by law for the performance of his duties as an Internal Revenue agent, such fee, compensation and reward being the following: a vacation for Cyril J. Niederberger at Miami, Florida, which included, among other things: a round-trip airfare ticket, lodging at the Doral Country Club, meals, drinks, rental car fees, and golf outing fees, totaling the approximate amount of $445.16.

In violation of Section 7214 of the Internal Revenue Code; 26 United States Code 7214(a)(2).

Exhibit "B-1"

FIFTH COUNT

The grand jury further charges:

On or about August 30, 1973, at Pittsburgh, in the Western District of Pennsylvania, the Defendants, GULF OIL CORPORATION and F. W. STANDEFER, did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with revenue laws of the United States, namely, a supervisory Internal Revenue agent, who was at the time Case Manager for the audit of the GULF OIL CORPORATION income tax returns for the years 1965, 1966, 1967, 1968, 1969, and 1970, in unlawfully and knowingly receiving a fee, compensation, and reward, to wit, a vacation for Cyril J. Niederberger and his wife at Absecon, New Jersey, which included, among other things, the following: airfare tickets, lodging at the Seaview Country Club, meals, drinks, and golf outing fees, totaling the approximate amount of $664.71, which were not prescribed by law for the performance of his duties as an Internal Revenue Agent.

In violation of Section 7214(a)(2) of Title 26, United States Code and Section 2 of Title 18, United States Code.

Exhibit "C"

SIXTH COUNT

The grand jury further charges:

On or about August 30, 1973, at Pittsburgh, in the Eastern District of Pennsylvania, the Defendant, CYRIL J. NIEDERBERGER, an officer and employee of the United States acting in connection with revenue laws of the United States, namely a supervisory Internal Revenue agent, who was Case Manager for the audit of the Gulf Oil Corporation income tax returns for the years 1969 and 1970, did unlawfully and knowingly, receive a fee, compensation, and reward, which was not prescribed by law for the performance of his duties as an Internal Revenue agent, such fee, compensation and reward being the following: a vacation for Cyril J. Niederberger and his wife at Absecon, New Jersey, which included, among other things: round-trip airfare tickets, lodging at the Seaview Country Club, meals, drinks, and golf outing fees, totaling the approximate amount of $664.71.

In violation of Section 7214 of the Internal Revenue Code; 26 United States Code 7214(a)(2).

Exhibit "C-1"

Points for Charge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal No. 77-139
F. W. STANDEFER	:	

POINTS FOR CHARGE

[Government Points for Charge Nos. 1 to 8 and 10-15 omitted from printing]

9. The United States is not required to prove that defendant Fred W. Standefer asked that some specific thing wrong be done in return for the giving of the vacations, things of value, compensation or rewards set forth in the indictment. United States v. Alessio, supra. United States v. Barash, 412 F.2d 26 (2nd Cir. 1968), cert. denied 396 U.S. 832 (1969). United States v. Irwin, supra. United States v. Cohen, supra.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal No. 77-139
F. W. STANDEFER	:	

TRANSCRIPT OF PROCEEDINGS

Jury Trial in the above-entitled action, beginning on November 28, 1977, United States District Court, Pittsburgh, Pennsylvania, before Honorable William W. Knox, District Judge.

APPEARANCES:

On behalf of the Government:

Craig McKay, Assistant United States Attorney

On behalf of the Defendant:

Harold Gondelman, Esquire

John Judson Ross - Direct

(p. 650, Volume 3)

Q. You knew about that one?

A. At the time, and I heard about the others later.

Q. So that June 16, 1974, I think is the Las Vegas trip. That one you knew about then?

A. That's correct.

Q. The others you heard about later?

A. Yes, sir.

Q. Now after the report of March 28, 1974, did the IRS conduct other investigations of Gulf Oil?

A. Yes.

Q. Were there other disclosures by Gulf in connection with political contributions and other matters?

A. Yes, sir.

Q. Was anything done by the IRS in April of 1975?

A. That's when they removed the regular agents from the audit in the later years and brought in a special group from the Intelligence Division.

Q. And how long did that special group from the Intelligence Division investigate Gulf and the trips and the IRS?

A. About 2 years.

Q. At the conclusion of the two year investigation by the Intelligence Division, do you have personal knowledge of what action was taken by the Department of Justice in regard to any criminal action from that investigation?

(p. 651)

MR. McKAY: Your Honor, may we approach the side bar?

THE COURT: Yes.

(At side bar, out of the hearing of the jury.)

MR. McKAY: Are we going to try the tax case here and the slush fund?

THE COURT: How is this relevant?

MR. GONDELMAN: Well, we have been trying the slush fund, Your Honor.

MR. McKAY: No, we are not.

MR. GONDELMAN: It is relevant because --

THE COURT: I'm talking about this decision not to make a criminal prosecution. How is that relevant?

MR. GONDELMAN: Because, you see, the so-called Bahamas Ex report of Niederberger is being attacked as having been purchased by a trip to Pebble Beach, California.

The fact is that after the IRS, with its Intelligence, with its impeccable Intelligence Division going at it hammer and tongs after Gulf, the United States Department of Justice has found that what Niederberger says in his report is true and accurate. There is no basis --

THE COURT: No, that doesn't follow at all. All it means is that they decided it wasn't worth while to bring a criminal prosecution.

MR. McKAY: That's correct.

(p. 652)

MR. GONDELMAN: But that's what Niederberger says in his report.

MR. McKAY: No, he doesn't.

THE COURT: Suppose they had decided to prosecute. Would you have let that in as admissible?

MR. McKAY: Excuse me. I will bring the attorneys from Washington here if we are going to get into that. They will tell the reasons why they didn't prosecute.

THE COURT: I don't think the fact that the U. S. Attorney or the Department of Justice decided not to prosecute somebody is admissible in a case such as this.

MR. GONDELMAN: Now my reason for making this offer, so that we understand it, because it is so prejudicial to this defendant in my opinion as to constitute reversible error, and I ask for a mistrial.

The fact is the Government has painted the entire picture here like the Niederberger report is something made out of whole cloth as a pack of lies, had nothing to do with a proper investigation, and had a proper investigation been performed, something would have happened, namely, the Intelligence Division who that report went to would have come in, made this big investigation and somebody would have gone to jail for it.

The fact of the matter is that after two years of intensive investigation by the Department of Justice and by the IRS and its Intelligence division, the sum and substance of

* * * *

(p. 654)

design.

THE COURT: Because the Government doesn't prosecute somebody, I don't think -- If anything, it might be showing bad judgment or good judgment on the part of the Government.

MR. GONDELMAN: At this point I then move for a mistrial, because the fact that this Niederberger report has been allowed in evidence under the circumstances, as Your Honor has permitted it, without permitting me to show the circumstances of the fact that it is a valid report to this date,--

THE COURT: You are privileged to show that, but all I am prohibiting you from disclosing is something that has already been revealed to the jury twice because of the questions and so on, that go to the criminal prosecution.

MR. GONDELMAN: What you are saying, Your Honor, is that the Government of the United States, because it is so big, is not bound by the same rules as any other corporation; and that is that if its lawyers in Washington take one action and somebody in Pittsburgh wants to do something else, no court is going to hold the Government to not talking out of both sides of its mouth.

THE COURT: All I am saying is it is not relevant. Objection sustained. Motion denied.

(In open court.)

MR. GONDELMAN: I would like to mark that as an

* * * *

In Chambers Proceedings

(p. 1146, Volume 6)

Tom had them.

(Mr. Seligson left chambers.)

MR. GONDELMAN: While we are getting this, Your Honor, may I state that I will also ask, although perhaps not incorporate it in my request for instructions, that Your Honor instruct this jury that the failure of the Government to prove that anything was done improperly by Mr. Niederberger is a factor to be considered.

All these cases which you say you don't have to prove, it doesn't exclude the probative value and the circumstantial evidence, if you will, that nothing improperly having been done would indicate then that what was done was not a reward, fee, or something of value because they got nothing in return.

MR. McKAY: Your Honor, I object to that. The Government need not offer any proof whatsoever that Mr. Niederberger did anything improper, fixed the audits or whatever.

MR. GONDELMAN: That's right.

MR. McKAY: That is the case law.

MR. GONDELMAN: But --

MR. McKAY: Mr. Gondelman is attempting to have the Court charge the jury that proof that he did nothing improper has probative value.

As a matter of fact, it has no probative value as regards these particular statutes, Your Honor.

(p. 1147)

MR. GONDELMAN: It has. It has value to the finder of fact, because it certainly ought to be obvious that a finder of fact can sit there and say if at this stage in time the Government can't prove that Niederberger did a thing wrong, then these trips must have been for friendship, not for compensation, or were not things of value for the performance of his duties.

At least it is a factual factor to be considered.

THE COURT: I don't think I will charge that.

MR. GONDELMAN: Well, --

THE COURT: Let's go over the Defendant's requests. Nos. 1, 2, 3 and 4 are requests for directed verdicts. They will be refused.

No. 5 -- Do you have these, Mr. McKay?

MR. McKAY: Yes. I am picking up my copy right now, Your Honor.

THE COURT: What about 5?

MR. McKAY: I do not regard that as a proper rule of law or proper charge to a jury.

THE COURT: Why?

MR. MCKAY: I believe that is a factual conclusion. It is part of the factual evidence and not part of the proper legal evidence.

THE COURT: I think that this point should be affirmed with a modification, the words "and the mere fact that he may

* * * *

Charge of the Court

(p. 2)

(The following proceedings were held in open court before the jury beginning at 11:35 a.m on December 9, 1977. Defendant was present with counsel.)

CHARGE OF THE COURT

THE COURT: Members of the jury, now that you have heard the evidence and the arguments of counsel, it becomes my duty to give you the instructions as to the law which applies to a case of this kind; and I will say to you, it is your duty as jurors to follow the law as stated in the instructions of the Court and to apply that law to the facts as you find them from the evidence in the case.

Now you are not to single out any one single instruction as stating all the law, but you should consider these instructions as a whole. Nor are you to be concerned with the wisdom of any rule of law as stated by the Court. Regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law

Charge of the Court

than that given in the instructions of the Court, just as it would also be a violation of your sworn duty as judges of the facts to base your verdict upon anything other than the evidence in the case.

Now you have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of

(pages 3 through 14 omitted from printing)

(p. 15)

official" to include any officer or employee or person acting for or on behalf of the United States or any department, agency or branch thereof in any official function under or by authority of any such department, agency or branch of government; and an official act is defined as meaning any decision or action on any question, matter, cause, suit, proceeding or controversy which may at any time be pending or which may by law be brought before any public official in his official capacity or in his place of trust or profit.

Now in particular, under this statute, these definitions would include as a public official an audit agent of the Internal Revenue Service.

The burden, of course, of proving such position is on the government.

In addition to that, however, the statute requires that the receipt be in connection with a proceeding in controversy or question, a matter, cause or suit, proceeding or controversy which may at any time be pending or be brought by him in his official capacity.

Now you will see, therefore, that the essential elements of this offense which must be proved by the government beyond a reasonable doubt are first that the recipient is an employee or official of a department or branch of the government; second, that he was acting in connection with his employment with the department or branch of government; third, that

(p. 16)

the defendant did give, offer or promise anything of value to him for or because of an official act performed or to be performed by him; fourth, that the defendant commits the act of giving, offering or promising knowingly and purposefully, and not through misunderstanding, inadvertence, mistake or some other innocent reason; and fifth, that such gift was with the purpose of giving a thing of

value for or by reason of the official act performed or to be performed by him, that is, in this case examination of the tax returns of Gulf Oil Corporation.

Now this is not, the Courts have said, a bribery statute, where you have to go on and you have to show corrupt motives and willfully intending to violate the law where money is given to a public official for the performance of a specific act or duty.

It is important for you to understand that in order to find this defendant guilty of giving, offering or promising anything of value to Agent Niederberger for or because of any official act performed or to be performed by him, that it is not necessary that you find the defendant gave such things of value with the intent of influencing an Internal Revenue Agent in performing his audit or audits of Gulf Oil Corporation's returns. It is sufficient if the defendant made these payments because of desire to create a better atmosphere with Niederberger with respect to the performance of the audit or

Charge of the Court

(p. 17)

appreciation for a speedy or favorable audit, and that Niederberger, knowing this, received a thing of value.

Whether the tax returns as filed were proper or improper is irrelevant to the issue in this case. The evidence, however, must show to your satisfaction beyond a reasonable doubt that the defendant gave something of value to a public official for or because of any official act performed or to be performed by such official.

If you conclude beyond a reasonable doubt that the vacations or trips or anything else of value were given to Niederberger, knowing that he was in a position to use his authority in a manner which would affect the conditions of the audit, then you could find that the things of value were given to him because of Niederberger's exercise of his authority, that is, for or because of any official act performed or to be performed.

In addition, you must find that the things of value were furnished to Niederberger otherwise

Charge of the Court

than as provided by law for the proper discharge of his official duty.

I will also say to you it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him for or because of an official act performed or to be performed by him in the course of his duty.

(p. 18)

Again, it is not necessary for the government to show that the gift caused or prompted or in any way affected the happening of the official act or its extent or manner or the means by which it was performed.

The words "making of the gift for or because of any official act" limit the prohibition against the act of making a gift to a public official to those who are accompanied by and made with this particular state of mind, design or purpose, which is the essence of intent.

Whether this regarded a specific intent or a limitation on the acts that are within the view of the section is of no consequence. The state of mind by which the act is done is, however, an

essential element of the offense which the government must prove.

Thus the government must prove to you beyond a reasonable doubt as to these 201(f) charges that the defendant willfully and knowingly, as distinguished from inadvertently or negligently, gave something of value to the agent because of official acts performed or to be performed by the agent, namely, the audit of the tax returns in question.

I must say to you, however, that if on the other hand these acts in making these gifts to Niederberger had nothing to do with giving of things of value to a public official for performance of acts to be performed by him, but on the contrary, as contended by the defendant, these things were given as a

(p. 19)

matter of friendship or for social purpose only, then you should acquit the defendant.

Now we move on to the other statute which was mentioned here, this 7214(a), and you have that before you, and, of course, you see that this starts, "Unlawful Acts of Revenue Officers or Agents. Any officer or employee of the United States acting in connection with any revenue law

of the United States, . . .(2) who knowingly demands other or greater sums than are authorized by law or receives any fee, compensation or reward except as by law prescribed for the performance of any duty shall be guilty of an offense against the United States."

Now under this section of the Internal Revenue Code, it is unlawful for any officer or employee of the United States acting in connection with any revenue law of the United States to receive any fee, compensation or reward except as prescribed by law for the performance of any of his duties.

As applied to this case, there are the following essential elements which must be proved by the government beyond a reasonable doubt to establish the offense charged: first, that the Internal Revenue Agent in this case, Niederberger, was an employee of the United States; secondly, that he was acting in connection with the revenue laws of the United States; third, that he received a fee, compensation or reward except as prescribed by law; fourth, that such fee, compensation or

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reward was for the performance by this employee of

any duty; -- I will say to you that a reward is a thing of value or money received for certain behavior, a fee is a payment for special services, compensation is the receiving of an agreed to payment after the performance of a service;-- fifth, doing of such act or acts knowingly, that is, willfully and purposefully and not because of mistake, inadvertence or accident or some other innocent reason.

Now as to the third element, the receipt of any fee, compensation or reward, I will instruct you that this would include, if you so find under the evidence in this case beyond a reasonable doubt, the receipt of any gratuity given because of the position of Niederberger as an Internal Revenue Agent in the performance of his duty as Case Manager for the audit of the Gulf Oil Corporation.

Under the fourth and fifth elements, I will say again that the act of receiving must have been done willfully and knowingly and not because of mistake or accident or some other reason.

It is, however, not necessary for a violation of this section of the Internal Revenue Code to

show that a particular favor was promised by the agent or expected of him. It is only necessary that the government prove to you beyond a reasonable doubt that Niederberger knowingly received compensation for the performance of his duty when such compensation was

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not prescribed by law, or, to put it bluntly, an Internal Revenue Agent should not receive additional compensation for doing his required duties.

In other words, these aiding and abetting counts -- and these are 1, 3, 5, 7 and 9, under 7214 require proof that the agent knowingly received a fee not prescribed by law for the performance of his duty, and that the defendant, in this case, Standefer, aided and abetted him in doing so willfully and knowingly.

Because up to this time I have been dealing with Neiderberger's receipt of these monies, but you remember the indictment does not charge Niederberger with receiving these monies, but it charges Standefer with aiding and abetting him in receiving them, because up to this time -- you may wonder,

"What has this got to do with Standefer?"

Well, this brings us to another statute.

Of course, Standefer wasn't an IRS Agent, and there is no pretense of that. But this other statute which is part of the U.S. Criminal Code provides as to aiding and abetting another to violate the law, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal, and whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

(p. 22)

Now, these words, "aid and abet," should be defined to you, and I will say that in order to aid and abet another to commit a crime, it is necessary the accused willfully associates himself in some way with the criminal venture and willfully participates in it as he would in something he wishes to bring about; that is to say, he willfully seeks by some act or omission of his own to make the criminal venture succeed, that is, in this case the receipt of unlawful compensation by Niederberger.

I must say to you that an act or omission is willfully done, as used here, if it is done voluntarily and intentionally and with specific intent to do something which the law forbids or intent to fail to do something the law requires to be done, that is to say, with a bad purpose to disobey or disregard the law; and while under the aiding and abetting statute it is required that the aiding and abetting must be willfully done, it is not required that there be any corrupt intent or motive.

I previously alluded to this with respect to the bribery statutes, which do require corrupt intent and motives; and I will say to you, therefore, that if you find beyond a reasonable doubt that the defendant Standefer willfully aided and abetted an IRS Agent in receiving a fee or compensation except as allowed by law for the performance of his duty, you may find the defendant guilty. Otherwise, if you do not so

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find, you should acquit him.

Since I have used the word "knowingly", I must define this to you, that an act is done knowingly if it is done voluntarily and intentionally and not because of a mistake or accident or

some other innocent reason.

Further I must say to you with respect to the word "intent" that intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the defendant's intent from the surrounding circumstances of the matter.

You may consider any statements made or acts committed by the defendant and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find a person intends the usual and natural, probable consequences of his act, but I say to you this is entirely up to you to decide from the facts in evidence.

Now, members of the jury, I have defined to you the elements of the offenses which are charged in this indictment and what you should consider as you approach these charges.

I'm not going to comment at length upon the evidence in this case. We have been here two weeks. I would take too

long to do the same fairly and without unduly emphasizing evidence on either side.

It is your duty to fairly consider all the evidence in the case. You must determine what you will believe.

If there is any question as to what is the fact on a certain matter, it is your recollection as to what the evidence was and what credibility you are going to give to each of the witnesses.

I will say to you, however, that it is the contention of the government that the defendant Standefer knowingly gave or caused to be given to Niederberger gifts and things of value, namely, these vacation trips, Niederberger being the Large Case Manager for Internal Revenue Service in charge of the audit of the tax returns of Gulf Oil, of which the defendant was vice-president, and that these things were given in connection with the performance of Niederberger's duties performed or to be performed, and that the same was compensation not authorized by law, in violation of Section 201(f); and that also the government contends that Standefer aided and abetted him in receiving compensation not authorized by law for the performance of his duties as an Internal Revenue Agent,

in violation of 7214, and thus it is claimed that the defendant is guilty of violating both of these statutes.

On the other hand, it is the defendant's contention that these trips and vacations were matters of friendship and

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social affairs, in accordance with the accepted practices in the industry and in business.

Further, his contention is that nothing was discussed on these trips concerning the audits or other business of the Gulf Oil Corporation.

He contends that he was not knowingly engaged in giving Niederberger compensation not authorized by law for the performance or non-performance of any duty performed or to be performed in connection with the audit of these returns or aiding and abetting Niederberger in receiving compensation not authorized by law for the performance of any duties.

Defendant contends that he did not knowingly or willfully violate the law and does not believe he did so. He contends that he is not guilty of any of these charges.

Now, members of the jury, the parties, it is their right to have requested of the Court for certain instructions.

To the extent that these requests have already been covered by my general charge, I will not repeat them at this time.

I may affirm a certain point, which means that it is a correct statement of the law, or I may affirm it with modifications, or I may refuse the points generally.

First, the points for charge presented by the government, the first is refused as already covered by the general charge.

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The second is refused as covered by the general charge.

The third is refused for the same reason.

The fourth will be affirmed with modification. It is sufficient for the purpose of proving intent that the giving of the vacation, things of value, compensation or reward set forth in the indictment were not accidental but intentional occurrences, even though the defendant Standefer may have been ignorant of any illegality. That

point is affirmed.

No. 5 is refused as covered by the general charge.

No. 6 is refused.

No. 7 is refused as covered by the general charge.

Nos. 8, 9 and 10 are refused for the same reasons.

No. 11 will be affirmed. The statutes at issue prohibit the agreement to give, offer or promise to give things of value for the purpose, if proven, of creating good will, favoritism and better working atmosphere or a preference in connection with a public official's performance of his official duties and acts. That point is affirmed.

No. 12 will be affirmed. I charge you as a matter of law that the vacation trips the defendant gave, offered or promised to give are not authorized by law to be given to Internal Revenue Service employees for the performance of Internal Revenue Service duties. With a slight modification, it is affirmed.

Nos. 13, 14 and 15 will be refused.

The government this morning presented two additional points.

The first will be affirmed with a modification. If you find beyond a reasonable doubt that the defendant committed each element of the offense charged, then you may find the defendant guilty. You may so find even though you also find that such evidence is widespread in the industry, where industry custom and practice cannot serve to repeal the criminal law. That point is affirmed with the modification, that these facts may be considered by you in determining what were his motives or purposes in connection with these matters.

Request No. 2 will be refused.

The defendant has also requested certain instructions.

Nos. 1, 2, 3 and 4 will be refused.

No. 5 will be affirmed as modified. I charge you that F. W. Standefer is not on trial for providing free vacations for Cyril J. Niederberger, and the mere fact that he may have arranged for vacations or for payment of same is not a crime--with the adding of the words -- in itself, but these are facts which may be considered by you

along with the other evidence in the case.

No. 6 will be affirmed. In order for you to find the defendant Standefer guilty of any of the counts of the indictment, you at first have to determine that the government has proved each of the essential elements of each offense

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beyond a reasonable doubt. If the government has failed to do so, then you must under your verdict as a jury find the defendant not guilty as to that particular count.

That's why we have broken these down, and we want your finding as to each particular count in this case.

No. 7 will be affirmed with a modification. Among the essential elements that the government must prove beyond a reasonable doubt as to Counts 2, 4, 6 and 8 is that in each count and as to each event the thing of value given to Niederberger was otherwise than as provided by law and was given to him solely as compensation for or because of an official act or acts to be performed by him. If the trips referred to in each of these counts of the indictment were solely by reason of the friendship of Standefer and Niederberger and not for or

because of any official act or acts performed or to be performed by Niederberger as an Internal Revenue Service Agent, then you must find the defendant Standefer not guilty. That point is affirmed with the modification that the official acts referred to are the audit of the Gulf tax returns.

No. 8 will be affirmed with a modification. As to Counts 1, 3, 5, 7 and 9 of the indictment, an essential element which the government must prove beyond a reasonable doubt is that the thing of value allegedly given in each of these counts must have been as a reward, fee or compensation for the performance of Niederberger's duty or duty to be performed as an

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Internal Revenue Service Agent. If the government in this case has failed to prove this essential element with reference to the audit of these returns beyond a reasonable doubt, it is your duty as a juror to find the defendant Standefer not guilty. That point is affirmed with the modifications.

Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 will be refused.

Nineteen is refused.

Twenty is refused as covered by the general charge.

Twenty-one will be given with a modification. It will be confirmed. You may consider whether Standefer had a good faith belief that his conduct did not constitute a crime if you find that he acted in reliance upon official interpretation and conduct of Internal Revenue Service officials in attending golf outings, parties, Christmas luncheons, dinners and the like paid for by the Gulf Oil Corporation. This may be considered by you, however, in conjunction with all the other evidence in the case in arriving at your findings.

Now, members of the jury, there is nothing peculiarly different in the way you should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence which is submitted to them. You are expected to use your own good sense.

Consider the evidence only for those purposes for which it has been admitted. Give it a reasonable and fair

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MR. GONDELMAN: Pardon?

THE COURT: I have used the word "willfully" in connection with aiding and abetting. That's refused.

MR. GONDELMAN: Next I object to that portion of your Honor's charge where you have taken from this jury the crucial fact of the defense that every audit that was performed was performed properly. At least they could so find.

You said it was irrelevant, and yet you have told them they could consider all the facts and circumstances.

The most important fact and circumstance, of course, in connection with Standefer's intent is whether those audits were conducted properly or improperly.

Having been conducted properly, it should be obvious that a finder of fact could weigh that very heavily in favor, even though it isn't an element of the crime.

Under this malum prohibitum nonsense the government is arguing in this case, even though they don't have the burden of proving that, the fact is that it is an important, crucial consideration for a jury in determining whether the payments were willful, voluntary, intentional, knowingly under 201 or 7214, very crucial.

THE COURT: In other words, what you say is the fact that he paid them the money, but it didn't take, that's a defense.

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Exception refused.

MR. GONDELMAN: It is a factor -- You said it is a defense. It is a factor in determining the guilt of the defendant when a question of whether it took or didn't take is a fact to be weighed by a jury on a factual determination, not as a matter of substantive crime, but a highly important element on whether or not in fact there was a crime committed at all.

THE COURT: Exception refused.

MR. GONDELMAN: Now I object specifically to Your Honor's instructions that it doesn't make any difference whether there was any agreement with Niederberger and the government doesn't have to show any agreement with Niederberger, when in fact in this whole case, most of the stuff that came in come in on the threshold of conspiracy, which requires that there be a showing of an agreement with Niederberger.

THE COURT: That's with respect to aiding and abetting.

MR. GONDELMAN: Well, that's also with respect to 201.

THE COURT: Also 201.

All right, exception refused.

MR. GONDELMAN: I object to the elements both as to 201(f) and 7214 as given by the Court, because the Court has not defined the area that giving a thing of value for or because of an act performed or to be performed, whether it is --

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in either of these cases, the language is the same; that is, that without the proof that the act -- that it is a fee for the act performed or to be performed, in Your Honor's definition of it, all you are saying is if something is given and an act is performed, the jury can find him guilty; and it is, as I understand it, not the law, but I understand your --

THE COURT: I don't think I told the jury that.

Exception refused.

MR. GONDELMAN: That's my interpretation of what Your Honor has said in this case. You have

specifically told the jury that "willfully" means differently than voluntarily or intentionally, but you have told them it does not require corrupt intent or motive on the part of the defendant.

THE COURT: The Court did use that exact language in distinguishing this from the bribery statute.

MR. McKAY: That's correct, as the cases so hold. As a matter of fact, U.S. v. Barash.

MR. GONDELMAN: But, you see, this isn't a bribery case.

THE COURT: That's right.

MR. GONDELMAN: That's why it is so unfair to try 201(f) and 7214(a)(2) together, because although -- You use aiding and abetting to get 7214(a) to say what 201(f) says directly. But you have ruled on that.

In addition, I object to the prejudice of this

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defendant having to have stood trial and how having this jury instructed on evidence relating to Counts 1, 3 and 5 of the indictment, which really isn't before the jury, because it is an academic exercise, because Niederberger has been acquitted of the 7214(a) violations; and again there is no law that's cited to the Court that will permit

Standefer to stand in the shoes of Niederberger, if Niederberger is acquitted of the very nature of the offense. It must have an Internal Revenue Service Agent present for --

THE COURT: I have ruled on that several times.

MR. GONDELMAN: I know, but I have to protect my record now, with the Court of Appeals.

I also -- Let me get the government's ones that you affirmed, Your Honor. May I?

(Pause.)

MR. GONDELMAN: I object to your Honor's reading the newfound additional point for charge which I didn't know about prior to argument, and that is the additional Point 1, that the conduct, even though widespread in the industry, cannot serve to repeal a criminal law.

Nobody said that, and the fact that the government wants to argue it and Your Honor has now read it in your points for charge --

THE COURT: Didn't Mr. McKay give this to you?

MR. McKAY: I provided that to Mr. Gondelman this

morning.

MR. GONDELMAN: This morning, but I didn't know what Your Honor was going to do with it until after I closed. I didn't even know you would consider it, because they weren't provided in proper form.

In addition, I think it is an improper prejudicial statement of law and is characterizing and making fun of a very serious contention.

Nobody is contending that what was done repealed the criminal laws of this country, but rather it slants the defense in this case prejudicially to the defendant.

Similarly, the reading to the jury of the fourth point for charge, that is, referral again to whether the things of value were accidental, even if ignorant of the illegality, is not -- It is pulled out of the case out of context and has nothing to do with this case, and I think, coming at the end of Your Honor's charge, is highly prejudicial.

MR. McKAY: That's the case law in numerous other cases on point.

MR. GONDELMAN: Obviously the Judge agrees with you, because he read it to the jury. I'm making my record at this time.

MR. McKAY: Fine, Mr. Gondelman.

MR. GONDELMAN: The reading to the jury of the government's Point 11, the statutes at issue, or being in

agreement, creating good will, favoritism, or better working atmosphere or of preference in connection with a public official's performance of his official acts and duties, the averments of that point highlight how terribly prejudicial it is to them, see, to say to this jury that even though you can find it was to create good will, favoritism, better working atmosphere or preference, to take away from the jury consideration of the fact that none of that was actually done here, because there was no preference, there was no favoritism, because these audit reports were accurate.

So you have said that it is illegal to do it if you do it for this reason, but we won't let you consider the fact that makes that not applicable to this case.

I object to 12, which says that as a matter of law, the vacations the defendant gave, offered or promised are not authorized by law, because you didn't also tell this jury that they are not specifically not authorized -- prohibited by law. There is nothing -- Nobody has put a regulation in this courtroom yet that says they are prohibited.

Now you are telling them they are not authorized. They think they are not authorized, they must be illegal, but that isn't the law.

THE COURT: Anyway, I think I left it open to the jury.

He had somewhere in there "must". I changed it to

* * * *

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(Three bailiffs were duly sworn.)

THE COURT: All right, here is the verdict slip and here is the indictment, which I have

already cautioned the jury about, that it is not evidence. It is sent out with you solely as a guide so as to follow these various charges in your deliberations.

All right, this Court will now recess for jury deliberations.

(The jury retired to begin their deliberations at 12:50 P.M.)

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(The following proceedings were held in chambers beginning at 4:15 p.m. on December 9, 1977. Defendant was present with counsel.)

MR. GONDELMAN: The record may show Mr. Standefer's presence with me in response to an instruction that the jury had a question.

THE COURT: The question is, "Is intent to be considered in any of the nine counts?"

MR. GONDELMAN: An easy answer, "Yes".

THE COURT: Well, it is considered in the odd numbered counts.

MR. GONDELMAN: No.

MR. McKAY: No, it isn't. That's correct.

THE COURT: You say that's correct?

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MR. McKAY: Well, I don't know what the jury is driving at. It is hard --

THE COURT: There is a shade between general intent and specific intent with willfulness and so on.

In my opinion, willfulness only applies to the odd numbered counts.

Of course, they asked for intent, but the allegation is knowingly, unlawfully and knowingly. That's the allegation of the indictment.

MR. GONDELMAN: But the difficulty, Your Honor, is that the jury is asking a question. If I may use the government's phraseology, it is a question which is general in nature, and the jury has asked Your Honor as to whether or not intent is to be considered in all nine counts of the indictment, and the answer to that is an unequivocal yes, because intent means the state of mind of Standefer.

THE COURT: That's right.

MR. GONDELMAN: And therefore it has to be yes.

THE COURT: Yes, that's right. All right.

The government agrees?

MR. McKAY: Your Honor, it is unclear what the jury is getting at. It seems to be a distinguishing between a general intent and a specific intent.

THE COURT: I'm not sure. You are reading something into it that isn't there.

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MR. GONDELMAN: That's my point.

MR. McKAY: I can't understand what the jury is driving at. The intent is not one of a specific criminal intent. I think that's clear, and certainly the 201(f) count, Your Honor, --

THE COURT: Well, that's what I had in mind.

MR. GONDELMAN: But that isn't the way the question reads, and it could be misleading to answer it in any other way than -- Because state of mind is intent. Intent is state of mind.

State of mind is the crux of all nine counts of this indictment.

MR. McKAY: That's not necessarily true, Your Honor, as the Court well knows.

THE COURT: I have already told them the language from -- What is the case? Cohen? It's not Cohen.

MR. SELIGSON: Irwin?

THE COURT: Irwin, yes. This is where it is found.

The making of the gift provision -- making it to a public official to include those which are accompanied by, in this particular -- state of mind, design or purpose, which is the essence of intent. Whether this is in regard to a specific intent or is a limited state of mind in which an act is done is an essential element the government must prove. That's on 201.

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MR. McKAY: The intent, I think what the jury is getting at is the difference between the general and specific intent.

The case law holds that merely intent of the actual consequences of your acts, namely 201(f), to give the gift in question. It is not a specific or corrupt intent.

I think that is a very important distinction in this case. This is not a corrupt intent.

THE COURT: All right.

MR. GONDELMAN: They didn't ask for corrupt intent as it is phrased.

I think what Your Honor said is the state

of mind of the defendant. I have no objection to your saying that to the jury, but if by intent they are asking whether the state of mind of the defendant is an element in all nine counts of the indictment, the answer is an unequivocal yes. It has to be.

MR. McKAY: I don't agree, Your Honor. The question cannot be answered by a simple yes or no.

THE COURT: Oh, I think so.

MR. McKAY: Because the counts are different. There is a difference between a specific intent to corrupt, to influence, and merely a general intent to give the gift; and it was not by mere mistake or inadvertence. I think that is very important, Your Honor.

To merely say yes or no I think would mislead the jury

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at this time.

THE COURT: All right, bring the jury down.

MR. GONDELMAN: Perhaps what I ought to say at this time, because it is clearly pointed up by the jury question, if Mr. Standefer intended to take Mr. Niederberger on any vacation as an act of friendship, that intent is non-criminal.

THE COURT: I have said that.

MR. GONDELMAN: But that's why the answer to the question on intent as to all nine counts is yes.

MR. McKAY: There is a different kind of intent involved. It is a general intent versus a specific intent.

MR. GONDELMAN: It is intent as to --

MR. McKAY: Excuse me, to corrupt or influence.

MR. GONDELMAN: It is the intent of, the purpose of the trip, and if the trip is friendship, it is an intent that is not criminal. That's why the answer to that question has to be yes.

MR. McKAY: Of course, an intent to create a favorable business atmosphere and relax tension is also an intent. Intent for speedy and favorable audit is an intent.

MR. GONDELMAN: That's why the answer still is yes.

THE COURT: I have already covered that.

MR. GONDELMAN: Even just what he said, the answer is still yes because the intent is an element. He just said it.

MR. McKAY: The question is indeed confusing in that

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it is so general.

THE COURT: Much of the confusion is caused by the fact you have these duplicating counts.

All right.

(The proceedings in chambers were concluded.)

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(The following proceedings were held in open court before the jury beginning at 4:15 p.m. on December 9, 1977. Defendant was present with counsel.)

THE COURT: Members of the jury, you had sent to the Court a question, "Is intent to be considered in any of the nine counts?"

The answer is yes.

With respect to each of these counts, it is necessary that you find that the defendant did intend to give gratuities or vacation trips or what-have-you to Niederberger for the purpose or because of an official act to be performed -- performed or to be performed by Niederberger; and as I have told you, it is necessary that you

find that he did this not inadvertently or negligently or by reason of mistake, but intending to give these things to the Internal Revenue Agent for or because of official acts.

For instance, with respect to the 201(f) charges, I told you it was necessary for the government to prove that the defendant committed the act of giving, offering or

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promising knowingly and purposefully and not through misunderstanding, inadvertence or for some other innocent reason, and that the gift was with the purpose or state of mind of giving a thing of value for or by reason of the official act performed or to be performed by the agent; and I told you on the other hand that if this had nothing to do -- if giving these gratuities had nothing to do with the giving of things of value to a public official, but on the contrary were given as a matter of friendship and for social purposes only, then you should acquit him; and this is the thing you have to decide. This is a very difficult thing and it is an important thing; and in these cases, with respect to all of these counts, for the reason that I told you,

intent is something that you can't prove directly. Someone said they would have to crawl into somebody else's mind, and of course, we know we can't do that, and there is no way of even putting a machine on somebody else's mind and finding out what he intends.

But what we say is, it need not be proved directly, but you may infer a defendant's intent from the surrounding circumstances, and therefore you may consider any statements made or done or acts committed or all the other facts and circumstances of the case in trying to determine what was his intention, what was his purpose to do by extending these gratuities, if you find that he did.

We further told you on the other charge that you had

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to find that he did these acts willfully or knowingly, willfully and purposely, and not because of mistakes, inadvertence or accident; and I think that is the problem.

I appreciate it is a very difficult problem. We often have that problem in many other circumstances, and particularly in the criminal law. What was the purpose, and what does the person intend by doing certain acts?

I don't know if I have clarified it. I have done the best I can in telling you that the state of mind of a person in connection with the charges is important, and I have differentiated the two things which must be considered in connection with it.

Who is the foreman?

JUROR NO. 6: I am.

THE COURT: Mr. Foreman, do you have any other question?

I don't know as I can clarify your problem any better than what I have done.

THE FOREMAN: The only other question, Your Honor, that I may bring up that could be in some of the people's mind, and yet we haven't discussed it, is, there was a point that was brought up, if I remember correctly, and this is in relation to the defendant's intent.

If there is any doubt whether the intent was there or not, in other words, in so many

words, if you are not sure

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one way or the other, then you are supposed to give your attention towards the acquittal?

THE COURT : Well, that's what I said early in my charge, that if you consider that the evidence permits either of two conclusions --

THE FOREMAN: Right.

THE COURT: -- why, then the government has not proved its case beyond a reasonable doubt.

You have got to determine that the government has proved beyond a reasonable doubt that these gratuities, vacation trips and what-have-you were extended for the purpose or on account of the official acts to be performed by the defendant, and not on account of friendship or for mere social purposes.

THE FOREMAN: Thank you, sir.

THE COURT: That is the crux of the matter. What was the purpose in doing this?

MR. McKAY: Your Honor, could I approach side bar?

THE COURT: Yes.

(At side bar, out of the hearing of the jury.)

MR. McKAY: Your Honor, I think the jury must be informed that if the intent is to relax business atmosphere or good will, that this is a sufficient intent in the 201(f) counts. I think that is confusing.

I think also the official act, it must be stated that

(p. 50)

the official act is the audits.

MR. GONDELMAN: You have said that already, Your Honor. I object to the repeating.

THE COURT: I have said that.

MR. GONDELMAN: Thanks.

(In open court.)

THE COURT: It has been suggested that I should inform you -- and I think I have, I think you all understand -- that the official act we are talking about here is the audit of the Gulf Oil Corporation returns in which this man was the Large Case Manager.

On the other hand, I have also pointed out to you that these statutes do not require that corrupt intention which goes for the bribery case; and further I informed you that it is sufficient if these payments were paid for any reason in connection with the audit, because of a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit, and that any of these would be purposes that whether the returns were correct or not is not relevant in this case. But it has to be for the purpose of giving these things to the agent on account of the audit of these returns and his position with respect thereto.

All right, the jury may retire for further deliberations.

(The jury retired to continue deliberations at

(p. 51)

4:25 p.m.)

MR. GONDELMAN: May we have exceptions noted?

THE COURT: Note exceptions for everybody.

MR. McKAY: Concerning the last question of the juror, it seemed like he was asking a question concerning -- The last question of the

juror, as he went through his -- directing his attention toward what is reasonable doubt, it was unclear what --

THE COURT: I think that's true, and I told him if the evidence permits two explanations, why, we have to draw the explanation of innocence. I thing that's boilerplate.

MR. GONDELMAN: I simply want to place on the record again the fact that I object to Your Honor's stating that the fact that the audits were correct is not a circumstance to be considered, because it is one of the most important circumstances, and to Your Honor's going on beyond the question of the jury and relating parts of the charge which really didn't relate to what they asked to --

THE COURT: Well, I had to do it, because it wasn't exactly clear just what the jury had in mind.

MR. GONDELMAN: I liked the question, Judge.

THE COURT: I should think you would.

(Court recessed at 4:25 p.m.)

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Supreme Court, U.S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

No. 79-383

In the Supreme Court of the United States

OCTOBER TERM, 1979

F. W. STANDEFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals panel wrote no opinion. The opinion of the court en banc (Pet. App. 1a-72a) is not yet reported. The opinion of the district court (Pet. App. 75a-112a) is reported at 452 F. Supp. 1178.

JURISDICTION

The en banc judgment of the court of appeals was entered on August 10, 1979. The petition for a writ of certiorari was filed on September 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant charged with aiding and abetting the commission of an offense may be convicted after the principal has been acquitted.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of four counts of making gifts to a public official, in violation of 18 U.S.C. 201(f) (counts 2, 4, 6, and 8), and of five counts of aiding and abetting a revenue official in accepting compensation in addition to that authorized by law, in violation of 26 U.S.C. 7214(a)(2) (counts 1, 3, 5, 7, 9).[1] Petitioner was sentenced to concurrent two-year prison terms, all but six months of which were suspended in favor of probation, and he was fined $2,000 on each count. The en banc court of appeals affirmed (Pet. App. 1a-72a).

The facts are set forth in the opinion of the court of appeals (Pet. App. 2a-8a). Briefly, the evidence showed that between 1971 and 1974 petitioner was the Vice-President of Tax Administration of Gulf Oil Corporation, and Cyril J. Niederberger was an Internal Revenue Service agent charged with auditing Gulf's federal income tax returns. During that time, Gulf, acting through petitioner, paid transportation, hotel, meal, and other expenses in connection with four golf vacations taken by Niederberger in Miami, Las Vegas, Pebble Beach, California, and Absecon, New Jersey, respectively. Gulf also paid Niederberger's hotel bill in connection with a trip to Pompano Beach, Florida. The Miami, Las Vegas, Pebble Beach, and Absecon trips were each the subject of one count of violating 18 U.S.C. 201(f) and one count of violating 26 U.S.C. 7214(a)(2). The Pompano Beach trip was the subject of one count of violating 26 U.S.C. 7214(a)(2).

[1]Petitioner was indicted together with Gulf Oil Corporation and its chief federal tax administrator, Joseph Fitzgerald. Gulf pleaded guilty and Fitzgerald pleaded nolo contendere to all counts of the indictment.

Prior to petitioner's trial, Niederberger was tried on a ten-count indictment charging violations of 26 U.S.C. 7214(a)(2) and 18 U.S.C. 201(g), which proscribes the acceptance of gifts by public officials, in connection with each of the five trips. Niederberger was acquitted on both counts involving the Pompano Beach trip and convicted on both counts involving the Las Vegas vacation and both counts involving the Pebble Beach vacation. As to the Miami and Absecon trips, he was acquitted of violating 26 U.S.C. 7214(a)(2), but convicted of violating 18 U.S.C. 201(g).

ARGUMENT

In his petition for a writ of certiorari, petitioner challenges only the three counts charging that he aided and abetted violations of 26 U.S.C. 7214(a)(2) in connection with the Miami, Absecon, and Pompano Beach trips.[2] In making this challenge, he does not contend that the evidence at his trial was insufficient to establish that Niederberger violated the statute or that petitioner aided and abetted the violation. Rather, he argues that his convictions were barred by Niederberger's prior acquittal on charges of violating the statute in connection with the same three transactions. The court of appeals properly rejected petitioner's claim in a comprehensive opinion upon which we principally rely.

1. The common law imposed various restrictions upon the manner of trying persons charged as accessories to crime. No such restrictions are contained, however, in the general federal aiding and abetting statute (18 U.S.C. 2) or in the Federal Rules of Criminal Procedure. In fact, as the court of appeals observed (Pet. App. 10a-17a), in

[2]Since the prison sentences petitioner received on the nine counts on which he was convicted were all concurrent, what is at stake here is only $6,000 in fines on the three challenged counts.

enacting the first federal aiding and abetting statute in 1909 Congress clearly intended to change the common-law rule that an accessory before the fact could not be convicted unless the principal had previously been or was simultaneously convicted. While the Senate Report (S. Rep. No. 10, 60th Cong., 1st Sess. 13 (1908)), which expressly states that Congress intended to allow for the prosecution of an accessory where the principal has died, been pardoned, or simply not yet been tried, does not speak to the circumstance in which the principal has been acquitted, the Report's enumeration does not purport to exhaust all the situations in which the statute changes the common law. If Congress had intended to bar the prosecution of an accessory where the principal has been tried and acquitted, it could easily have said so. Thus, petitioner would have this Court read into the statute an exception that finds no support in either the language of the statute or its legislative history. This the court of appeals correctly declined to do.

2. This case raises no substantial constitutional issue. No violation of either the Due Process or Double Jeopardy Clause inheres in the conviction of an aider and abettor following the acquittal of the principal. In the prosecution for aiding and abetting, the government must establish beyond a reasonable doubt the guilt of both the defendant and the principal, and it may attempt to do so only once as against the defendant. The mere fact that inconsistent verdicts may have been reached by different juries is not a ground for complaint, for much the same reasons that verdicts reached as to a single defendant by the same jury are not subject to challenge on grounds of inconsistency. *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943). In this case, for example, the acquittals of Niederberger on charges of violating 26 U.S.C. 7214(a) in

connection with the Miami and Absecon trips and his convictions of charges of violating 18 U.S.C. 201(g) in connection with the same trips might well have constituted a compromise verdict. Niederberger could not have challenged his convictions as to these two trips on the ground that they were inconsistent with his acquittals as to the same trips. It makes little sense to permit petitioner to exploit arguable inconsistencies between his convictions and prior acquittals that may well have represented " 'no more than [the jurors'] assumption of a power which they had no right to exercise, but to which they were disposed through lenity.' " *Dunn* v. *United States*, 284 U.S. 390, 393 (1932).

3. Moreover, the court of appeals properly adhered to the well-settled rule that a criminal defendant may not invoke the doctrine of collateral estoppel based on the result of a prior prosecution of a different defendant. See *United States* v. *Peltier*, 585 F. 2d 314, 335 (8th Cir. 1978), cert. denied, No. 78-893 (Mar. 5, 1979); *United States* v. *Brown*, 547 F. 2d 438, 444 (8th Cir.), cert. denied, 430 U.S. 937 (1977); *United States* v. *Musgrave*, 483 F. 2d 327, 332 (5th Cir.), cert. denied, 414 U.S. 1023 (1973); Annot, 9 A.L.R. 3d 203, 218-220 (1966). As this Court pointed out in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970) (emphasis supplied):

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit.

Important policy considerations militate against limiting or barring the prosecution of one defendant because of the outcome of the trial of another defendant—even if, as here, the latter's guilt is an essential element of

the former's. Criminal responsibility is personal and individual, and, as indicated above, an acquittal of a principal does not necessarily mean that the jury entertained a reasonable doubt as to his guilt. Furthermore, very often constitutional and other restrictions on the admission of evidence impose on the proof against one defendant limitations that do not apply as to other defendants.[3]

In civil litigation, allowing different defendants to assert collateral estoppel in successive actions brought by the same plaintiff is thought to promote judicial economy by encouraging the plaintiff to join all the defendants in the same action. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979); *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971). In criminal cases, on the other hand, the government, which is as likely as the courts to find its resources overtaxed by the volume of potential criminal cases, normally needs no encouragement to seek to try as many defendants together as it fairly can. On the contrary, if defendants are permitted to benefit from favorable results in trials of co-defendants, there is every reason to expect increased numbers of

[3]The restriction imposed by the Confrontation Clause on the admissibility of co-defendants' confessions is a common example. If one charged with aiding and abetting the commission of a crime makes a valid out-of-court confession that tends to show not only his own involvement, but also the actual commission of the offense by the principal, and if the aider and abettor then chooses not to testify at trial, the confession would be admissible against its maker but not against the principal. See *Bruton* v. *United States*, 391 U.S. 123 (1968). The exclusionary rule for Fourth Amendment violations furnishes another example. Evidence suppressed as to a principal because obtained in an unlawful search of his house will be admissible against any aider and abettor whose own privacy rights were not violated by the search. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

severance motions and considerable procedural maneuvering by groups of co-defendants seeking to have tried first the one of their number as to whom the government's case is weakest.

As the court of appeals noted (Pet. App. 25a), petitioner "has suffered no encroachment on his liberty." His constitutional rights were observed, and his trial was fair.[4] Relying on a "social purposes" defense, he admitted that he had arranged for the payment of Niederberger's travel expenses (Tr. 985). Co-defendant Gulf Oil pleaded guilty and co-defendant Joseph Fitzgerald nolo contendere to all counts of the indictment. Niederberger himself was convicted on a number of counts of a similar indictment. There is no reason in logic or policy why a "classic example of somewhat inconsistent jury verdicts" (Pet. App. 39a) in the Niederberger trial should bar petitioner's conviction on any counts.

4. Finally, as the en banc court further found (Pet. App. 17a-21a), its decision in this case is in accord with the weight of authority. See, *e.g.*, *United States* v. *Musgrave*, *supra*; *United States* v. *Azadian*, 436 F. 2d 81 (9th Cir. 1971); *Pigman* v. *United States*, 407 F. 2d 237 (8th Cir. 1969); *Gray* v. *United States*, 260 F. 2d 483 (D.C. Cir. 1958). See also *United States* v. *Coppola*, 526 F. 2d 764, 776 (10th Cir. 1975). With two exceptions, the

[4]Petitioner suggests (Pet. 20) that the district court improperly instructed the jury that it was not necessary for the government to show that petitioner or Gulf Oil Corporation received quid pro quo for the trips, *i.e.*, that Gulf's tax returns or Niederberger's audit were incorrect (see Instruction Tr. 20-21, 50). The court's instruction was correct, however. *United States* v. *Niederberger*, 580 F. 2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978). The court gave complete instructions on criminal intent and on petitioner's principal theory of defense, *i.e.*, that the trips were given purely out of friendship (see Instruction Tr. 20-25, 46-50).

cases relied upon by petitioner are distinguishable. *United States* v. *Bernstein*, 533 F. 2d 775, 799 (2d Cir.), cert. denied, 429 U.S. 998 (1976); *United States* v. *Stevison*, 471 F. 2d 143 (7th Cir. 1972), cert. denied, 411 U.S. 950 (1973); and *United States* v. *Hoffa*, 349 F. 2d 20, 40 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966), stand for the proposition that, in prosecuting an aider and abettor, the government must prove the guilt of the principal. The government clearly did so in trying petitioner as an aider and abettor in this case. In *United States* v. *Smith*, 478 F. 2d 976 (D.C. Cir. 1973), an aiding and abetting conviction was reversed in connection with the reversal of the principal's murder conviction on the ground that the prosecuting attorney had improperly discouraged an eyewitness from giving testimony that tended to show that the principal had acted in self-defense. The testimony in question was relevant to the question whether the government had proved that any crime had been committed, and the improper conduct on the part of the prosecutor was as prejudicial to the aider and abettor as it was to the principal.

The Fourth Circuit alone has taken the position that an aiding and abetting conviction cannot stand alongside an acquittal of the principal, regardless of the order in which the two prosecutions are brought. *United States* v. *Shuford*, 454 F. 2d 772, 779 (4th Cir. 1971); *United States* v. *Prince*, 430 F. 2d 1324 (4th Cir. 1970). In *Prince*, a conviction for aiding and abetting was reversed because, while the appeal was pending, the principal was acquitted. In *Shuford*, an aiding and abetting conviction was vacated because the principal's conviction had been reversed on grounds that his severance motion should have been granted. The court indicated that the vacated aiding and abetting conviction would be reinstated if the principal were convicted in his retrial, but would be reversed if the principal were acquitted.

In both cases, the Fourth Circuit relied solely on this Court's decision in *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963). In *Shuttlesworth*, however, the Court held simply that there can be no conviction for aiding and abetting where the principal committed no crime. The decision did not involve the question whether an aiding and abetting conviction is barred by prior acquittal of the principal where, as here, the government is able to prove the commission of an offense by the principal in the aiding and abetting trial.

We submit that the *Prince* and *Shuford* decisions constitute erroneous applications of a common-law rule that has clearly been changed by Congress. They are isolated deviations in the case law on the question presented in this case, and as such, they may well in time be corrected. In our view, the conflict in circuits they create is not presently of sufficient importance to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-383

F. W. STANDEFER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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CITATIONS TO OPINIONS BELOW

The August 10, 1979 en banc opinion of the Court of Appeals for the Third Circuit is not reported in the Federal 2d series. It appears at pages 1a through 72a, inclusive, of Appendix A to the petition for writ of certiorari and is reported at 79-2 USTC 7072. The opinion of the court of appeals panel was withdrawn when a rehearing by the court en banc was granted.

The opinion of the district court is reported at 452 F. Supp. 1178 (W.D. Pa. 1978)

JURISDICTION

Title 28 U.S.C. §1254(1) confers jurisdiction on this Honorable Court.

FEDERAL STATUTES INVOLVED

Title 18 U.S.C. §201(f) provides as follows:

> "Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;" is guilty of an offense.

Title 18 U.S.C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets,counsels, commands, induces or procures its commission, is punishable as a principal."

Title 26 U.S.C. §7214 (a)(2) imposes a criminal sanction against:

"Any officer or employee of the United States acting in connection with any revenue law of the United States. . . (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty."

QUESTIONS PRESENTED

1. Can a defendant be convicted of aiding and abetting a principal when the only named principal, who must be an employee of the Government of the United States to have committed the substantive offense, has been acquitted by a jury of committing the substantive offense of which the aider and abettor is charged?

2. Does not the interpretation of the aider and abettor statute by the court below create a new substantive crime which Congress never intended by:

   a). allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted;

   b). eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting;

   c). allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

STATEMENT OF THE CASE

F. W. Standefer, a vice president of Gulf Oil corporation, was indicted for aiding and abetting, 18 U.S.C. §2, an Internal Revenue Service

officer, Cyril J. Niederberger, in committing a violation of 26 U.S.C. §7214(a)(2) and for violation of 18 U.S.C. §201(f). The indictment under the 26 U.S.C. §7214(a)(2) counts charged that Standefer:

> ". . . did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with the revenue laws of the United States . . . in unlawfully and knowingly, receiving a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue Agent. . . .". (A., pp. 13, 15, 17, 20, and 22, being Counts 1, 3, 5, 7 and 9 of the indictment.)

Cyril J. Niederberger, the IRS agent identified in the Standefer indictment had been previously indicted and tried to a jury for violation of the substantive counts of 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201(g). The indictment against Niederberger, to No. 76-143 Criminal, charged that Niederberger:

> ". . . did unlawfully and knowingly receive a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue Agent. . .". (A., pp. 30, 34, 36. Counts 2, 4 and 6 of the Niederberger indictment (26 U.S.C.A. §7214(a)(2))

Counts 1, 3 and 5 of the Standefer indictment and Counts 2, 4 and 6 of the Niederberger indictment recite the same dates, times, amounts and facts. Niederberger was acquitted of the substantive offenses charging him with receiving a fee, compensation and reward, and Standefer was convicted of aiding and abetting Niederberger in unlawfully and knowingly receiving the same fee, compensation and reward of which Niederberger was acquitted. 1/

A motion to dismiss these counts of the indictment against Standefer was filed in the court below and attached to said motion were the counts of the indictment against Standefer and the counts of the indictment against Niederberger to demonstrate that they involved identical factual situations. (A., pp. 24 through 36, inclusive). Standefer's motion to dismiss was denied and the case went to trial before the court and jury. Jury selection commenced on November 29, 1977 and concluded on December 12, 1977 with a transcript in excess of 1100 pages of testimony. After the court charged

1/ Niederberger's conviction of §201(g) counts and §7214(a)(2) counts not here material was affirmed in United States v. Niederberger, 580 F.2d 63 (C.A. 3, 1978); cert. denied, 99 S.Ct. 567 (1979).

the jury and exceptions were taken by defendant to the charge on intent, the jury retired at about 12:50 P.M. At 4:15 P.M. the jury returned and presented the following question to the court:

> "Is intent to be considered in any of the nine counts?" (A. 75a)

Defendant contended that the answer to the question was "yes". The court then stated to the jury that the answer was yes and went on to attempt to distinguish elements of the offense under §201(f) and §7214(a)(2). At the conclusion of the court's remarks, Government counsel at side bar insisted that the court further charge the jury. Over the objection of counsel for defendant, the court then told the jury, inter alia, that:

> ". . . whether the returns were correct or not is not relevant in this case." (A. 87a)

After the court had charged the jury that it was not necessary to show any agreement between the revenue agent and the aider and abettor, and that if the golf trips were paid for by Gulf and authorized by Standefer, no specific or criminal intent or agreement was required, the jury returned a verdict of guilty as to all nine counts.

Post-trial motions were filed and denied by the trial court. An appeal to the Court of Appeals for the Third Circuit was taken and argued before a three-judge panel. Two of the members of the three-judge panel affirmed the conviction, with a dissenting opinion by Judge Aldisert. A petition for rehearing before the court en banc was filed and granted, and the previous opinion of the court of appeals was withdrawn. For the argument before the court en banc, counsel for the parties were directed by the clerk of the Court of Appeals for the Third Circuit to focus on the following two questions:

> "1. Whether Congress, in enacting 18 U.S.C. §2(a), intended to allow conviction of an aider and abettor even though the named principal has been acquitted.
>
> 2. Whether United States v. Bryan, 483 F.2d 88 (3rd Cir. 1973), should be overruled."

A five-judge majority of the court en banc affirmed the conviction. Two judges dissented from the conviction on all three counts on which the principal had been acquitted and Judge Gibson dissented from a conviction of one count on which the principal had been acquitted.

This case involves the specific facts of a principal going to trial to a jury and being acquitted. It does not involve the hypothetical situations referred to in the majority opinion of the court of appeals as to what might happen or what might be argued if other technicalities had arisen which resulted in the acquittal of Niederberger. 2/ A jury verdict has established factually that Niederberger was not guilty of committing the substantive offenses in receiving compensation from Standefer which Standefer is now convicted of aiding and abetting Niederberger in receiving.

SUMMARY OF ARGUMENT

It is undisputed that the substantive violation of 26 U.S.C. §7214(a)(2) under the facts of counts one, three and five of the Standefer indictment were alleged to have been committed only by Cyril J. Niederberger, the IRS agent in charge of Gulf Oil audits. It is also undisputed that the

2/ United States v. Bryan is distinguishable on its facts for the reason that the principal was found to be an innocent dupe and yet the substantive crime was committed. Niederberger had to receive compensation not authorized by law for the substantive crime to exist at all.

Niederberger case was tried to a jury, alleging that Niederberger in fact committed the substantive offense and that as to those facts relating to counts one, three and five of the Standefer indictment, Niederberger was acquitted by the jury before Standefer was even indicted. Niederberger is the only potential principal and it has been held in United States v. Shuford, 454 F.2d 772 (C.A. 4, 1971); United States v. Prince, 430 F.2d 1324 (C.A. 4, 1970); United States v. Smith, 478 F.2d 976 (D.C. C.A. 1973); United States v. Bernstein, 533 F.2d 775 (C.A. 2, 1976); United States v. Stevison, 471 F.2d 143 (C.A. 7, 1972); United States v. Jones, 425 F.2d 1048 (C.A. 9, 1970), that where the only named and potential principal is acquitted, a jury cannot convict an aider and abettor.

As will hereinafter be shown, the legislative history of the aiding and abetting statute, as well as the commentary to the Model Penal Code, would indicate that the law has not allowed an aider and abettor to be convicted where the only named principal who could have possibly committed the substantive offense has been acquitted on the factual determination by the jury finding him innocent of the substantive offense. As stated by Judge

Aldisert in his dissent (Petition for Certiorari, Appendix A, p. 42a):

> "Indeed, upon analysis, it can be seen that our court's approach here is a lonely one."

He further stated (Petition for Certiorari, Appendix A, p. 43a):

> "Even if it were the 'clear majority position' that an aider and abettor may be convicted despite acquittal of the principal, the result reached in this case is a giant step beyond the holdings of any of the cases cited by the majority."

If Standefer had been tried with Niederberger and Niederberger had been acquitted of the substantive offenses, the law is clear that Standefer would have been required to have been acquitted of the same substantive offenses. The fact that the United States attorney chose to first indict a principal and try him and then later indict an alleged aider and abettor and try him should not allow the illogical result here obtained to stand. 3/

3/ An analogy might also be drawn to the holding in Great A & P Tea Co. v. FTC, 99 S.Ct. 925, 59 L.Ed. 2d 153 (1979), that under the Robinson-Patman Act a buyer cannot be liable for a violation unless a prima facie case can be established against the seller. Your Honorable Court reversed the judgment of the FTC as affirmed by the court of appeals.

It is respectfully submitted that since the United States has chosen the method of procedure, it, as any other litigant, is bound by the findings of a prior jury under the doctrine of collateral estoppel. As stated by Mr. Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 455, 90 S.Ct. 1189 (1970), the Rules of Civil Procedure require the litigation of all factual matters arising from one occurrence in one trial. Certainly the same rule should apply to the same federal government indicting individuals in the same district court, with the same grand jury, with the same facts and at the same time.

Once it is determined that the three counts of the indictment should have been dismissed before trial on defendant's motion, the issue is whether such a failure is so prejudicial to the defendant as to require a reversal and remand for new trial on the remaining counts. The court of appeals engaged in hypothetical situations not here applicable. If the three counts had been dismissed and the issues then narrowed, much of the evidence which the Government adduced in support of the three substantive counts involving §7214(a)(2) would have been inadmissible. If there is no distinction between §7214(a)(2) and §201(f) as the majority

opinion of the court of appeals would seem to hold, then the defendant was prejudiced by having to go to trial on duplicitous counts. The court at the conclusion of the case indicated the duplicitous nature of the counts when it stated to counsel in attempting to answer the jury question on intent:

> "Much of the confusion is caused by the fact that you have these duplicating counts." (A., 81a)

Counsel for the defendant had suggested that they were not duplicating but rather duplicitous counts.

The trial strategy of so complicated a case cannot be Monday morning quarterbacked. 4/ The defendant has been denied a fair trial by the failure of the trial court to eliminate three counts of the

4/ One of the errors in the trial occurred when counsel for Niederberger indicated to the court that if Niederberger were granted immunity, his testimony would be exculpatory of the defendant Standefer. The court stated that Niederberger was available to either party and the United States attorney indicated Niederberger was still under investigation and that his problems were not over. See R. 606a, 607a, 608a. At R. 609a Niederberger's counsel told the court in chambers that his client would contradict a government witness.

indictment which would eliminate much evidence and prejudice from the trial of the defendant. There are a myriad of possibilities in connection with the defense as to admissible evidence; as to trial strategy and other aspects of the conduct of the trial which the defendant should have an opportunity to present on a clear indictment involving only those counts of which a jury could properly find him guilty on the facts. But with the prejudicial facts eliminated, the defendant would have a fair trial and an opportunity to have a jury find him not guilty by reason of the lack of prejudicial evidence entering the case as well as the complications of the instructions of the trial court.

Further, in the last charge to the jury (A. 87a), the court directed that Niederberger, as the Large Case Manager, was performing an official act covered by the statute without distinguishing §7214(a)(2) or §201(f). The balance of the instruction is limited to the §201(f) counts on intent and not the specific intent under §7214(a)(2). Thus, the confusion in the counts created the unfairness to the defendant which would require a remand for new trial.

It is no answer to the prejudice to the defendant that he was convicted of a §201(f) violation because counts one, three and five require

that he be convicted of aiding and abetting the commission of the substantive offense of §7214(a)(2). In this regard, both the concurring and dissenting opinions of the Court of Appeals for the Third Circuit use the Acts interchangeably. Such confusion of applicable statutes to a defendant violates the holding in Viereck v. United States, 318 U.S. 236 at 241, 63 S.Ct. 561 at 563 (1943), in which it was held:

> "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority, and then only if punishment is authorized by Congress."

The statutes as applied by the courts, it is respectfully submitted, would be void for vagueness if the confusion is permitted to stand.

The instruction of the court on intent was improper and requires that a new trial be granted. Since the indictment specifically charges in these counts that Standefer did aid and abet Niederberger, it is necessary to look to the definitions of the words "aid and abet". Black's Law Dictionary, Fourth Edition, defines "aid and abet" as follows:

> "Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. . . .
>
> Implies knowledge. . . It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary . . . But it is not sufficient that there is a mere negative acquiescence not in any way made known to the principal malefactor. . .".

The definitions of aid and abet all necessarily convey the fact that two persons must act in preconcert with an agreement as to their purpose. The court, on the other hand, charged the jury:

> ". . . it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him for or because of an official act performed or to be performed by him in the course of his duty." (A. 51a)

Specific exception was taken to this portion of the charge (A. 67a), and although the court in overruling the exception indicated that this would refer only to aiding and abetting, counsel suggested it also referred to §201. The court never told the jury which statute the statement referred to.

As a further ground for new trial, the unfairness of proceeding under the charge of the court on intent should weigh the scales in favor of the granting of a new trial. It was shown that Gulf Oil Corporation had paid in excess of $150,000,000 in taxes as a result of the Niederberger audits. The majority of the Government's case concerned the Bahamas Ex Report and an attempt to relate the timing of golf trips to dates on which audit reports were completed by Niederberger. The defense showed that Standefer had nothing to do with the Bahamas Ex Report and further showed that the $150,000,000 in taxes paid as a result of the audits reflected that Niederberger had done his job without corruption, influence, compensation, fee or reward. The court in its charge told the jury that if they concluded beyond a reasonable doubt that the vacations or trips or anything of value was given, knowing that Niederberger was in a position to use his authority to affect the conditions of the audit, then

> ". . . you could find that the things of value were given to him because of Niederberger's exercise of his authority, that is, for or because of any official act performed or to be performed.
>
> "In addition, you must find that the things of value were furnished to

> Niederberger otherwise than as provided by law for the proper discharge of his official duty." (A. 50a, 51a)

In light of that instruction and the question of intent submitted by the jury, the court's recharge of the jury directed the jury that the official act which the court was talking about was the audit in which Niederberger was the Large Case Manager; that it was sufficient if the payments were paid for any reason in connection with the audit,

> ". . . because of a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit, and that any of these would be purposes that whether the returns were correct or not is not relevant in this case." (A. 87a) 5/

5/ The instruction again indicates the basic unfairness of a trial which never informs the defendant of the specific act of which he is charged with violating. There is no evidence, from all of the IRS agents who testified for the Government, that the golfing trips were to result in a speedy audit or in any way affect the outcome of the audit in time or amountwise. It again pinpoints the unfairness of a charge which says if the trip was "for any reason" given to an IRS agent, a citizen is guilty of a crime. Under that charge and interpretation, it is again suggested the statute would be void for vagueness for no citizen could be certain that a jury would find vague conduct criminal though the parties acted in good faith believing their conduct not culpable.

If the audits were improperly prepared, the Government would have attempted to prove that fact in order to establish the criminal intent involved in both §201(f) and §7214(a)(2). The converse, it is submitted, is also true, namely, that since the audits were correct, the jury had a right to consider that fact as relevant evidence on the determination of the issue of the defendant's intent which was the specific question the jury asked the court after several hours of deliberation.

Specific exception was made at the conclusion of the court's charge. The court had taken from the jury the crucial fact of the defense that every audit that was performed was performed properly. (A. 67a) The argument made to the trial judge that the correctness of the audits was a fact to be weighed by a jury and was a factual determination on a highly important element of whether or not in fact there was a crime committed.

It is also important to note that the witness John Judson Ross, in connection with his duties at Gulf Oil relating to IRS functions, was prepared to testify that in April, 1975, Gulf Oil was informed by letter of the Criminal Division of the Department of Justice that their investigation of the Bahamas Ex Report was concluded with no criminal

action being taken (A. 40a, 41a) He would also have testified the letter came after a two-year intensive investigation by the IRS special investigative unit. The testimony of the manner of the preparation of the Bahamas Ex Report and the political slush fund implications of Gulf had been extensively tried by the Government in order to poison the minds of the jury against the defendant Standefer. When the defendant attempted to neutralize the poison by showing that the Government itself had found that the Bahamas Ex Report was in fact correct and when the defendant attempted to have the court instruct the jury and permit the jury to consider the fact that the $150,000,000 (R. 502a) paid by Gulf after Niederberger's tax audits was a factor for them to consider in connection with the criminality of the golf trips, the court did not allow the evidence to be introduced and in its charge to the jury prejudiced the defendant and allowed the poison to remain. The total effect was to allow Gulf Oil, who was no longer a defendant in the case, and Niederberger, who had already been acquitted of three of the counts of the indictment, to be tried when Standefer was the sole defendant.

As previously stated, exception was made to the charge that it made no difference whether there

was any agreement with Niederberger and that an agreement need not be shown in order to convict Standefer. Aiding and abetting and counselling one to commit a crime requires an agreement. The crimes of which Standefer was indicted, especially the aiding and abetting counts, require a specific intent whether the substantive crime requires an intent or not. One cannot aid and abet an IRS agent in receiving compensation in violation of the law without an agreement as to what the compensation or fee or reward is being given for. One cannot conspire with oneself. One cannot aid and abet without the principal knowing that he is being aided and abetted. The principal must know what the fee, compensation or reward is for and the aider and abettor must know the purpose for which the fee, compensation or reward is being offered. The burden of proof beyond a reasonable doubt remains with the Government.

Since the denial of the motion to dismiss was in part based upon the same erroneous interpretations of the law by the trial court, the three counts of the indictment should be dismissed and the case remanded for new trial on the remaining six counts of the indictment.

A R G U M E N T

I.

A DEFENDANT CANNOT BE CONVICTED OF AIDING AND ABETTING A PRINCIPAL WHEN THE ONLY NAMED PRINCIPAL, WHO MUST BE AN EMPLOYEE OF THE GOVERNMENT OF THE UNITED STATES TO HAVE COMMITTED THE SUBSTANTIVE OFFENSE, HAS BEEN ACQUITTED BY A JURY OF COMMITTING THE SUBSTANTIVE OFFENSE OF WHICH THE AIDER AND ABETTOR IS CHARGED.

As stated in the statement of facts and summary of argument, the issue here involved is whether the acquittal of Niederberger demands the dismissal of the indictment on aiding and abetting against Standefer. The Court of Appeals for the Third Circuit, when ordering the matter to be heard by the court en banc, directed counsel for the Government and defendant to brief the issues of whether Congress in enacting 18 U.S.C. §2(a) intended to allow conviction of an aider and abettor even though the named principal had been acquitted and, as a corollary, whether United States v. Bryan in the Third Circuit should be overruled.

In approaching this issue, the first applicable principle of statutory construction of penal provisions is that they are strictly construed.

As Chief Justice Marshall held in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820):

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department."

In 1909, Congress enacted an aiding and abetting statute which provided:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Act of March 1, 1909, Chapter 321, 35 Stat. 1152, formerly §332 of the Penal Code, now 18 U.S.C. §2(a), as amended.

The congressional intent in enacting this provision is referred to in detail by Judge Aldisert in his dissent (Petition for Certiorari, Appendix A, pp. 50a, 51a). As Judge Aldisert concluded, the reports on the Act of 1909 attempted to remove the existing impediments to the trial of an accessory, such as when the principal escaped, failed to plead, was pardoned or died. There is no reference to the

removal of the existing impediment to the conviction of an aider and abettor where the only named principal who could have committed the offense was acquitted.

In 1951, the section was amended to read as follows:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The legislative history of the amendment is short and states as follows, 1951 U.S. Code Congressional Service, p. 2583:

> "This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.
>
> "Section 2(b) of title 18 is limited by the phrase 'which if directly performed by him would be an offense against the United States,' to persons capable of committing the specific offense. Section 2(a) of such title, while not containing

that language, is open to the inference that it also is limited in application to persons who could commit the substantive offense. If regarded as a definitive section, the section makes the aider and abetter a 'principal'. It has been argued that one who is not a bank officer or employee cannot be a principal offender in violations of section 656 or 657 of title 18 and that, therefore, persons not bank officers or employees cannot be prosecuted as principals under section 2(a).

"Criminal statutes should be definite and certain."

It is noted that the amendment of 1951 changed the characterization of an aider and abettor from "a principal" to "punishable as a principal". The 1951 amendment, therefore, appeared to make definite and certain the fact that although an aider and abettor could not be indicted for the substantive crime, he could, nevertheless, be punishable as a principal if a principal has in fact committed the substantive crime. Neither the amendment nor the history tries to remove the existing impediment of the acquittal of the principal.

It is respectfully suggested that congressional consideration of the revision and reform of Title 18 of the United States Code suggests that to

date Congress has not enacted a statute which bars the acquittal of a principal as a defense to the aider and abettor. Senate Bill 1722, 96th Cong., 1st Sess., §404, under Chapter 4, labeled "complicity", 6/ contains the following language:

> "(a) TREATMENT AS PRINCIPAL.-- A person whose criminal liability is based upon section 401 may be charged, tried and punished as a principal.
>
> "(b) BAR TO PROSECUTION. -- It is a bar to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that all of the persons for whose conduct the defendant is alleged to be criminally liable have been acquitted in a separate trial or trials because of insufficient evidence determined by the court not to have been occasioned by a suppression order.
>
> "(c) DEFENSES PRECLUDED. -- Except as provided in subsection (b), it is not a defense to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that --
>
> (1) the defendant does not belong to the category of persons who by definition are the only persons

6/ It appears the Model Penal Code and the proposed revisions use complicity rather than aiders and abettors or conspirators. Thus, one could infer these changes involve broader terms than 18 U.S.C. §2(a) of which Standefer stands charged.

capable of committing the offense directly; or

(2) the person for whose conduct the defendant is criminally liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution."

§501 states:

> "Except as otherwise required by the Constitution or by a federal statute, the existence of a bar to a prosecution under any federal statute . . . shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience."

§404(b) would indicate that if a defendant is indicted as a conspirator with others and all others have been acquitted in a separate trial, or trials, because of insufficient evidence it is a bar to the prosecution. Except for the provision of subsection (b), Congress is proposing as a bar the defense of acquittal for the conduct of a person who the defendant is charged to be criminally liable.

Under Senate Bill 1723, introduced September 7, 1979, the same day as Senate Bill 1722,

Chapter 5 refers to complicity. §504 precludes certain defenses such as

> "(2) The person for whose conduct the defendant is being held liable has been acquitted. . .".

§505 contains, in brackets, the following:

> "[Existence of bar if accomplice's acquittal is based on ground of insufficient evidence.]"

The face of the Senate Bill indicates that:

> "Certain bracketed material may be omitted in the final version of the bill. Use of brackets also indicates alternative language and certain technical and drafting questions."

In the submitted revisions of the Criminal Code of the United States Code, Congress has not yet enacted a definitive and unambiguous statement that the acquittal of a sole principal subject to the laws of the United States will not bar the conviction of an aider and abettor. The Congressional Record of the Senate, September 7, 1979, S. 12,208, contains three short paragraphs on complicity, none of which refers to the problem presented on this appeal.

The Model Penal Code, Section 2.06(7) provides:

> "An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted."

The majority opinion of the court of appeals in upholding the conviction of an aider and abettor where the principal has been acquitted stated:

> "The clear majority position, however, is the view taken by the Model Penal Code -- namely that no such bar exists." (Petition for Certiorari, Appendix A, p. 17a)

The commentary to the Model Penal Code for Section 2.06(7) is contained in Tentative Draft 1, page 13, and contrary to the majority opinion observes:

> "The change does open up the possibility that an accomplice may be prosecuted though the person charged with the commission of the crime has been acquitted, a possibility that does not obtain in states that dispense only with requiring the previous conviction of the principal. While inconsistent verdicts of this kind present a difficulty, they are intrinsic to the jury system and appear to be a lesser evil than granting immunity to

> the accomplice because justice has miscarried 7/ in the charge against the person who committed the offense.
>
> "Whether in a joint trial of an accomplice and the person charged with the perpetration of the crime, an acquittal of the latter should require the acquittal of the former, absent evidence that the alleged accomplice committed the offense himself, ought to be governed by the general position taken with respect to the validity of an inconsistent verdict. No position on this issue has been taken, therefore, in the draft. Nor does the draft take a position on the evidential question whether the judgment of conviction or acquittal of the person charged with the commission of the crime should be admissible upon a later trial of an alleged accomplice as proof or disproof

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7/ It is interesting that the majority opinion of the court of appeals and the A.L.I. assume that if one is acquitted under the American trial system it is a miscarriage of justice rather than a declaration by the jury that no crime has been committed. See Benton v. Maryland, 395 U.S. 784, 813, 89 S.Ct. 2056, in which Justice Harlan stated:

> "The State had no more interest in compelling petitioner to stand trial again for larceny, of which he had been acquitted, than in retrying any other person declared innocent after an error-free trial. His retrial on the larceny count therefore, in my opinion, denied due process, and on that ground reversal would be called for under Palko." (Emphasis added)

of the proposition that the crime was so committed. Trials for complicity ought not be governed by a special rule of evidence on the admissibility of judgments in a later litigation involving different parties. That is a problem for the law of evidence, not for the Penal Code." (Emphasis added)

It is obvious that the Model Penal Code was drawn to allow an accomplice to be convicted if a principal is acquitted because if the statute does not so provide, such an illogical and irrational result has not been judicially decreed. The Code does not direct itself to the present fact situation where, as Judge Aldisert observed in his dissent, the only person in the world who could have committed the substantive offense as a principal was acquitted. (Petition for Certiorari, Appendix A, p. 47a)

Furthermore, since the Model Penal Code then suggests that the Rules of Evidence should govern, the Federal Rules of Evidence, Rule 201, referring to judicial notice, is apposite and provides:

"(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

"(b) Kinds of facts. A judicially noticed fact must be one not subject to

reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Under the Federal Rules of Evidence, therefore, a judge in the Federal District Court of the United States for the Western District of Pennsylvania knows that in that very court an indictment alleging the very facts against a principal as later alleged against an aider and abettor has resulted in the principal being acquitted. Judicially noticing that fact must lead to the conclusion as a matter of law that since the principal has not committed a §7214(a)(2) offense, no person subsequently can be convicted of aiding and abetting that sole principal of doing that which he has been acquitted of doing.

The application of collateral estoppel by judicial notice would be consistent with the ruling of Ashe v. Swenson, supra. Although Ashe v. Swenson dealt with double jeopardy, the philosophy of that holding is analogous to the instant situation. Niederberger, who had already been tried and acquitted of certain counts was necessarily retried as a principal in the case of Standefer, on those counts of

which he had already been acquitted, for it was Niederberger who must have received the fee, compensation or reward for the performance of his official duties as a principal for Standefer to be guilty as an aider and abettor. To that extent, Niederberger was then tried in absentia on counts 1, 3 and 5. If, as stated in Ashe v. Swenson, the Double Jeopardy clause of the Constitution responds to the increasing widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best romotes justice, economy and convenience so does collateral estoppel promote the same interests under the facts of this case.

> ". . . The Federal Rules of Criminal Procedure liberally encourage the joining of parties and charges in a single trial. Rule 8(a) provides for joinder of charges that are similar in character, or arise from the same transaction or from connected transactions or form part of a common scheme or plan. Rule 8(b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information. These rules represent considered modern thought concerning the proper structuring of criminal litigation.

> "The same thought is reflected in the Federal Rules of Civil Procedure. A pervasive purpose of those Rules is to require or encourage the consolidation of related claims in a single lawsuit. Rule 13 makes compulsory (upon pain of a bar) all counterclaims arising out of the same transaction or occurrence from which the plaintiff's claim arose. Rule 14 extends this compulsion to third-party defendants. Rule 18 permits very broad joinder of claims, counter-claims, cross-claims and third-party claims. . ." Ashe v. Swenson, supra.

As stated in said opinion, the principles of res judicata and collateral estoppel caution the civil plaintiff against splitting his case. Collateral estoppel under the facts of the instant case should stand "as a constitutional barrier against possible tyranny by the overzealous prosecutor. . . ".

II.

THE INTERPRETATION OF THE AIDER AND ABETTOR STATUTE BY THE COURT BELOW CREATES A NEW SUBSTANTIVE CRIME WHICH CONGRESS NEVER INTENDED, BY (a) ALLOWING AN AIDER AND ABETTOR TO BE CONVICTED WHEN THE PRINCIPAL IS TRIED BY A JURY AND ACQUITTED; (b) ELIMINATING THE NEED THAT AN AIDER AND ABETTOR HAVE SPECIFIC CRIMINAL INTENT IN ORDER TO BE FOUND GUILTY OF AIDING AND ABETTING; (c) ALLOWING THE CHARGE OF THE COURT BELOW TO ELIMINATE FROM THE CONSIDERATION OF THE JURY THE CORRECTNESS OF RETURNS AUDITED BY THE INTERNAL REVENUE SERVICE AGENT IN DETERMINING THE ISSUE OF INTENT WHERE THE JURY AFTER DELIBERATION ASKED THE COURT WHETHER INTENT WAS TO BE CONSIDERED IN ITS DELIBERATIONS.

A. Allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted.

The amendment of the aider and abettor Act in 1951, instead of providing for the defendant to be "a principal" provided that the aider and abettor would be "punishable as a principal". Congress, under 26 U.S.C. §7214 requires that a defendant be an officer or employee of the Government of the

United States acting in connection with the revenue laws of the United States. That person is Niederberger. No amount of judicial construction or distortion of legislative purpose can establish as a substantive crime the indictment of Standefer as an employee or officer of the United States acting in connection with any revenue laws of the United States. He was a vice president of Gulf Oil Corporation. If a revenue officer of the United States, namely, Niederberger, did not violate §7214(a)(2), Standefer cannot be a principal nor can he be punishable as a principal for the principal is not punishable.

B. Eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting.

The Court of Appeals for the Third Circuit had previously held that the government did not have to prove a quid pro quo in order to convict Niederberger. United States v. Niederberger, supra. Although the substantive offense has been held not to require intent, the crime of aiding and abetting, counselling, commanding, inducing or procuring the commission of a substantive offense by the very

definitions of the terms themselves would obligate the Government to prove a specific intent and agreement. As cited above, the charge of the court has eliminated that substantive requirement of proof by instructing the jury that no such agreement need be proved nor need any intent be proved. Therefore, Standefer stands convicted by an amendment to the statute by judicial fiat eliminating agreement and specific intent as elements of the substantive crime.

Furthermore, since aiding and abetting requires the interaction of two persons in violation of the specific and strictly construed criminal statutes, the decisional law concerning conspiracy is applicable. The cases unanimously hold, and the Model Penal Code, as well as the proposed revision of the Federal Criminal Code, applies the rational and logical result that if only one person is convicted out of a group of alleged co-conspirators, that person's conviction must be set aside. See Morrison v. California, 291 U.S. 82, 92, 54 S.Ct. 281, 285 (1934), which held "conspiracy imports a corrupt agreement between not less than two . . ."; Hartzel v. United States, 322

U.S. 680, 64 S.Ct. 1233 (1944); Bates v. United States, 323 U.S. 15, 65 S.Ct. 15 (1944); dictum in United States v. Fox, 130 F.2d 56 (C.A. 3, 1942), cert. denied, 317 U.S. 666; Romontio v. United States, 400 F.2d 618 (C.A. 10, 1968); Lubin v. United States, 313 F.2d 419 (C.A. 9, 1963); United States v. Whitfield, 378 F. Supp. 184 (D.C.E.D. Pa., 1974), aff'd. without opinion, 515 F.2d 507 (C.A. 3, 1975). Aiding and abetting requires a guilty principal as much as a conspiracy requires at least two guilty conspirators.

C. Allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

The majority of the facts introduced in the trial court involved Gulf Oil Corporation's audits and a special report titled the "Bahamas X Report" and an attempt by the Government to show that somehow the audits and the "Bahamas X Report" were related to the golf trips. Part of the defense involved the fact that since Gulf had paid some

$150,000.00 in additional taxes because of the audits and Mr. Standefer was not involved in the "Bahamas Ex Report", these facts would bear on whether Standefer had a criminal intent in providing the golf trips or if the golf trips were provided for business friendship as contended. The trial court has no discretion to take from a jury the defendant's theory of his defense on which a foundation is laid by the evidence. See United States v. Mitchell, 495 F.2d 285, 288 (C.A. 4, 1974); United States v. Leach, 427 F.2d 1107, 1112 (C.A. 1, 1970), cert. denied, 400 U.S. 829; Government of Virgin Islands v. Carmona, 422 F.2d 95, 99-100, n.6 (C. A. 3, 1970): United States v. Grimes, 413 F.2d 1376, 1378 (C.A. 7, 1969); Sparrow v. United States, 402 F.2d 828 (C.A. 10, 1968); Bursten v. United States, 395 F.2d 976, 981 (C.A. 5, 1968), cert. denied, 409 U.S. 843; Baker v. United States, 310 F.2d 924, 930 (C.A. 9, 1962), cert. denied, 372 U.S. 954; Levine v. United States, 261 F.2d 747, 748 (D.C. Cir. 1958); Marson v. United States, 203 F.2d 904, 912 (C.A. 6, 1953).

Standefer testified that the entertainment expenditures were made to establish a rapport and relieve tension that built up on the big audits. (R. 838a). He testified that it was his understanding of his duties in accordance with the policies of

Gulf Oil as to IRS agents that he was to develop a rapport and

> ". . . as a matter of fact, when I first came into Pittsburgh, I had not made this arrangement, but within a month there was a joint party between the Gulf people -- it was a joint party between the Gulf people and the IRS; and even though we were having all the friction at that point, I observed that it seemed that the people could get out on the golf course and realize that maybe the other ones weren't -- didn't have horns, and it seemed to improve communications and rapport." (R. 837a)

The defendant testified that frequently when the golf trips were taken he did not even know that the audits were either closed or were going to be closed by the I RS. (R. 864a)

Similarly, at R. pages 670a, 671a, 674a, 680a, 681a, 684a and 686a, the testimony of Fitzgerald, the co-defendant, who pleaded nolo contendere to the indictment, established that as to any of the golf outings referred to in the indictment none were in any way connected with fee, compensation or reward to Niederberger in connection with the IRS audits of Gulf Oil Corporation but were solely social golf trips, some of which Mr. Standefer did not even initiate.

The Gulf Oil audits were civil proceedings and were not adversary proceedings. They were conducted in the premises of Gulf Oil in office space provided by Gulf Oil, at no cost to the Government. In effect, the Government of the United States had its IRS agents operating out of free offices given to them by Gulf Oil for the purpose of establishing a rapport and convenience, both to the Government and to employees of Gulf so that the auditing procedure could be carried out as expeditiously and as accurately as possible. There was no legal adversary proceeding between Gulf and IRS agents in the auditing procedures. The IRS hierarchy condoned the use of free office space at Gulf's offices and participated with its employees in the acceptance of entertainment, lunches, retirement parties and the like during the entire period the audits were being conducted. With these facts in evidence, the court's charge that if the "payments were paid for any reason in connection with the audits because of a desire to create a better working atmosphere or appreciation for a speedy and favorable audit and that any of these would be purposes that whether the returns were correct or not is not relevant in this case" (A. 87a) was an erroneous charge and highly prejudicial to the defendant.

Intent was perceived by the jury to be its key function in the analysis of each of the nine counts of the indictment. On the issue of intent, this Honorable Court has scrupulously protected the right of a defendant to have that issue tried by a jury alone, without any interference by the instructions of the trial judge. In Morissette v. United States, 342 U.S. 246 (1952), it was held that:

> "[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue."

It is recognized that the issue decided in Morissette involved the charge that the law raises a presumption of intent from a particular act. However, it is respectfully submitted that the holding in Morissette establishes the principle of criminal law that it is the jury, and the jury alone, that has the right to determine intent from all of the relevant evidence and not by judicial fiat.

In United States v. United States Gypsum, 438 U.S. 422 (1978), Morissette was affirmed and your Honorable Court held:

> "[u]ltimately, the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function."

In an attempt to satisfy this constitutional requirement, the trial court, in its original charge (A. 58a) stated:

> "You may consider it reasonable to draw the inference and find a person intends the usual and natural, probable consequences of his act, but I say to you this is entirely up to you to decide from the facts in evidence."

With the overall erroneous charge as originally given, the jury asked whether intent was to be considered in any of the nine counts. The court then charged the jury that Niederberger's position as an IRS agent in charge of the Gulf Oil audits made him a person whose actions were official acts under the statute and took away from the consideration of the jury the issue of corrupt intention. The charge that it was sufficient if the payments were paid for any reason in connection with the audits was tantamount to a directed verdict of guilty and did not consider the defense that the golf trips were taken for friendship and were not within the purview of the meaning of the criminal statutes. The error was irreversibly compounded by again erroneously charging the jury that the correctness of the returns was not relevant nor to be considered in determining guilt. Thus, the very defense, of which there was sufficient

evidence to submit as a factual question to the jury, was taken from the jury by the charge of the court. A contrary instruction should have been given and had been requested. Exceptions protected the record for the defendant. The prejudice can only be cured by the granting of a new trial.

CONCLUSION

Standefer was sentenced to pay a fine on three counts in an indictment in which the motions to dismiss filed before trial should have been granted. The aiding and abetting statutes should be strictly construed. It should now be determined that Standefer cannot be guilty of aiding and abetting Niederberger in committing a substantive offense of which Niederberger had been previously acquitted.

The trial court erred in not dismissing the three counts of the indictment before the jury was empaneled. The trial court compounded its error in its instructions to the jury and in taking away from the jury the factual defense, of which there

was abundant evidence, that Standefer had nothing to do with the Bahamas Ex Report; that the criminal division of the IRS and the Department of Justice had declined criminal prosecution of anyone involved in the preparation of the Bahamas Ex Report; that the audits resulted in payments in excess of $150,000,000 by Gulf Oil, all to be weighed by the finder of fact in determining whether the golf trips were fee, compensation or reward under the penal statutes or friendship and social as contended by defendant. The elimination of the relevant evidence from the consideration of the jury deprived the defendant of a fair and impartial trial. Not only was that evidence removed from the jury's consideration but, after the inquiry of the jury as to whether intent was to be considered in any of the nine counts of the indictment, the court in effect directed a verdict of guilty by charging the jury that "the official act we are talking about here is the audit of the Gulf Oil Corporation's returns" by Niederberger, who was Large Case Manager assigned to said audits. The appellant is entitled to the benefit of the doubt where trial error resulted in his conviction instead of an acquittal. The remaining six counts

of the indictment should be remanded to the court below for retrial.

Respectfully submitted,

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Supreme Court, U.S.
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No. 79-383

FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1979

F. W. STANDEFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The court of appeals panel wrote no opinion. The opinion of the court en banc (Pet. App. 1a-72a) is not yet reported. The opinion of the district court (Pet. App. 75a-112a) is reported at 452 F. Supp. 1178.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 10, 1979. The petition for a writ of certiorari was filed on September 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant accused of aiding, abetting, counseling, commanding, inducing, or procuring the commission of an offense against the United States may be convicted under 18 U.S.C. 2 after the actual perpetrator has been acquitted.

2. Whether the district court erred in instructing the jury that a violation of 18 U.S.C. 2 does not require proof of an agreement and that it could not consider whether income tax returns and reports received by an IRS official were correct in determining whether a violation of 26 U.S.C. 7214(a)(2) had occurred.

STATUTES INVOLVED

18 U.S.C. 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. 201(f) provides as follows:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official [is guilty of an offense].

26 U.S.C. 7214(a)(2) imposes a criminal sanction against:

> Any officer or employee of the United States acting in connection with any revenue law of the United States * * * who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on four counts of making gifts to a public official, in violation of 18 U.S.C. 201(f), and on five counts of aiding and abetting a revenue official in accepting compensation in addition to that authorized by law, in violation of 26 U.S.C. 7214(a)(2).[1] Petitioner was sentenced to concurrent terms of six months' imprisonment followed by two years' probation on each count. He was fined $2,000 on each count, for a total of $18,000.

1. The evidence at trial established that petitioner had been the head of Gulf Oil Company's tax department in Pittsburgh, Pennsylvania, since 1966 (Tr. 981). At the time of trial he was Vice President in charge of tax administration (Tr. 982). Co-

[1] Petitioner was indicted together with Gulf Oil Corporation and Joseph Fitzgerald, a manager in Gulf's tax department. Gulf pleaded guilty and Fitzgerald pleaded nolo contendere to all counts of the indictment.

defendant Joseph Fitzgerald was a manager in the tax department (Tr. 116, 795). Cyril Niederberger was an agent of the Internal Revenue Service in Pittsburgh who was the large-case manager in charge of the audits of Gulf Oil Company's income tax returns from 1967 until June 1974 (Tr. 1128-1129, 1134). In this position, Niederberger supervised a group of revenue agents assigned to audit certain of Gulf's corporate tax returns (Tr. 376-379). His responsibilities included the development of audit plans, which consisted of detailed outlines of specific procedures to be utilized during each particular audit. In developing these plans, Niederberger made all final decisions with respect to the scope and depth of the investigation to be undertaken by the IRS agents (Tr. 376-377). In addition, as large-case manager Niederberger submitted a large-case report at the conclusion of each audit. This report was the major source of information about the audit and was used by the IRS in making its decisions to challenge any aspect of the returns. Due to the complexity of large audits, it was virtually impossible for any reviewing process to discover omissions in the large-case report (Tr. 503). For these reasons the large-case manager was the single most important IRS official in a corporate audit (Tr. 495).

During the period of time Niederberger served as the large-case manager for the Gulf audits, he received five free vacations paid by Gulf:

a. *Pompano Beach (July 1971):* The first of these vacations took place in July 1971. Niederberger requested that Fitzgerald make him hotel reservations in Pompano Beach, Florida (Tr. 813-814). Fitzgerald made these reservations and sent the hotel a $50 advance deposit, for which he was reimbursed by Gulf (Tr. 13, 812). The Niederbergers stayed in Pompano Beach from July 11 through July 18 (Tr. 13-14). Acting on instructions from petitioner, Fitzgerald paid for the Niederbergers' hotel and restaurant bill, a total of $356.80, and was reimbursed for this amount by Gulf (Tr. 18-26, 812, 849-950, 1016).

b. *Miami (January 1973):* On January 19-22, 1973, Niederberger accompanied petitioner, Fitzgerald, and a Gulf consultant to Miami, Florida, for a golfing vacation at the Doral Country Club (Tr. 73-76). Niederberger had been invited by Fitzgerald, who was acting on instructions from petitioner (Tr. 815, 1019). Niederberger's expenses, including air fare, hotel accommodations, meals, and golf fees were paid for by Gulf (Tr. 77, 131-132, 1020).

c. *Absecon (August-September 1973):* On August 31 through September 3, 1973, the Niederbergers were again invited on a golfing vacation with petitioner, Fitzgerald, and several other Gulf personnel. The group stayed at the Seaview Country Club in Absecon, New Jersey (Tr. 31-44). Again, Gulf paid for the Niederberger's air fare, meals, golf, and lodging (Tr. 312-314, 843).

d. *Pebble Beach (April 1974):* Again acting at petitioner's request, Fitzgerald made arrangements for a vacation for Niederberger at Pebble Beach,

California (Tr. 818-819). Niederberger, Fitzgerald, and petitioner stayed at the golf resort from April 2-4, 1974. Gulf paid all expenses (Tr. 90-96, 316-317, 1035).

e. *Las Vegas (June 1974)*: The Niederbergers were given a final free vacation in June 1974. Petitioner, Fitzgerald, Niederberger (and family members) and another Gulf employee travelled to Las Vegas, Nevada, and stayed at the Desert Inn and Country Club from June 17-June 21, 1974 (Tr. 104-110). At petitioner's instruction, the Niederbergers were given $200 cash for expense money, and their entire bill was paid for by Gulf (Tr. 317, 828-830). Other members of the Gulf party were given only $50 cash for expenses (Tr. 830).

In addition to the five vacations provided to Niederberger by Gulf, Niederberger received free meals, drinks, entertainment or gifts from Gulf on 302 other occasions (Tr. 253). The total value received by Niederberger was approximately $7,000 dollars (Tr. 201). While documentation for these other expenditures was attached to the expense reports and filed in the general accounting file, documentation for the vacation trips was preserved by the tax department in their confidential files (Tr. 267-269, 845, 868). No IRS agents other than Niederberger received free vacation trips, and Niederberger was not given vacations after June 1974, when he ceased to be the large-case manager for Gulf (Tr. 201-202, 844, 845, 1075-1076).

Harold Levin, the Chief of the Appellate Branch of the IRS in Richmond, Virginia, testified that the

dates of the vacations given to Niederberger often coincided with important dates in the administration of the Gulf audits (Tr. 375-383). The audit plan for the years 1962-1964 was approved on July 14, 1971 (Tr. 381); the Pompano Beach vacation concluded and was paid for by Gulf on July 18, 1971 (Tr. 14). The audits for the years 1965-1966 were closed between February 23 and March 5, 1973 (Tr. 382); the Miami vacation had taken place one month previously, on January 19-22, 1973 (Tr. 73). The 1967-1968 audits were closed between May 10 and June 22, 1973, and the plan for Gulf's 1969-1970 audit was approved on June 27, 1973 (Tr. 383); the Absecon vacation occurred two months later, from August 31 to September 3, 1973 (Tr. 57). The 1969-1970 audits were closed between April 15 and June 27, 1974 (Tr. 383); the Pebble Beach vacation was April 2-5, 1974, and the Las Vegas trip was June 17-21, 1974 (Tr. 90-95, 106-110). Significantly, these four audits were all closed as "agreed audits," that is, Gulf agreed to pay proposed additional assessments without resort to available administrative procedures (Tr. 377-386). Levin testified that it was unusual for four large audits all to be closed in this way (Tr. 386).

In addition, the reservations for the Pebble Beach trip were made on March 28, 1974—the same date Niederberger submitted a memorandum concluding an IRS investigation of a slush fund maintained by Gulf for the purpose of making political contributions (Tr. 94, 386-387). Niederberger had been assigned by the IRS to investigate the slush fund, which was

maintained by the Bahamas Exploration Corporation, a subsidiary of Gulf (Tr. 390-391, 572). At that time the Bahamas Exploration Corporation showed a deficit of $9.2 million due in part to $5 million in secret campaign contributions given to local, state and national politicians (Tr. 398, 550-552). At the time Niederberger conducted his investigation, federal authorities, in particular the Watergate special prosecutor,[2] knew only of the existence of approximately $350,000 of the fund (Tr. 540). Although Niederberger was informed by the attorney for Gulf that approximately $5 million had come out of the slush fund over the years, he refrained from revealing this figure in his report to the IRS (Tr. 394-403, 552, 564). Instead, Niederberger submitted a report, prepared almost completely by Gulf's attorney, which indicated that the deficit was largely due to expenses in oil exploration (Tr. 399). Based on Niederberger's memorandum, the 1968-1970 audits were closed (Tr. 403). Had Niederberger's superiors at the IRS known of the $5 million in contributions, the audits would have been expanded rather than closed (Tr. 406).

Petitioner took the stand at trial and testified in his own defense. He admitted that he and Fitzgerald had provided the trips in question and that they had been paid for by Gulf funds (Tr. 985). Petitioner

[2] On November 13, 1973, Gulf pleaded guilty to making political contributions in violation of 18 U.S.C. 610 (Tr. 400, 417).

contended that the trips had been purely social in nature, although he conceded that they were designed to "relieve tension" that might otherwise develop on a large audit and to "establish rapport" with the IRS (Tr. 985, 1035). Although petitioner insisted that Niederberger was taken along on the golf vacations as a friend, petitioner admitted that he had never called Niederberger at home or at his office, never visited Niederberger's home, and had never used his own money to pay for gifts to Niederberger (Tr. 1073, 1077). Fitzgerald testified that petitioner and Niederberger were not close personal friends (Tr. 826). Petitioner also regularly submitted "representation letters" to his superiors stating that all expenditures made or authorized by him, including payments for the vacation trips, were in the ordinary course of Gulf's business and that Gulf would benefit directly or indirectly from the expenditures (Tr. 124-130, 157-158).

2. Petitioner was charged with four counts of violating 18 U.S.C. 201(f), with respect to the Miami, New Jersey, Pebble Beach, and Las Vegas vacations. That statute prohibits making direct or indirect gifts or promises "because of any official act performed or to be performed" by a public official (see page 2, *supra*). He was also charged with five counts of violating 26 U.S.C. 7214(a)(2) and 18 U.S.C. 2, one count with respect to each of the vacations.[3] 26 U.S.C. 7214(a)(2) prohibits any federal employee, acting in connection with any revenue law, from re-

ceiving any "fee, compensation, or reward * * * for the performance of any duty" (see page 3, *supra*). 18 U.S.C. 2(a) provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal." In the five counts charging violations of Section 7214(a)(2), petitioner was charged with aiding, abetting, counseling, commanding, inducing or procuring Niederberger's acceptance of compensation not authorized by law.

Niederberger had been tried separately on similar charges in a previous trial. Niederberger was charged in a ten-count indictment with violating 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2) with respect to each of the five vacation trips. He was convicted on four counts of violating Section 201(g) (as to the Miami, Absecon, Pebble Beach, and Las Vegas vacations) and on two counts of violating Section 7214(a)(2) (as to the Pebble Beach and Las Vegas trips). He was acquitted on both counts involving the Pompano Beach trip and the Section 7214(a)(2) counts with respect to the Miami and New Jersey trips.[4]

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[3] The statute of limitations had apparently run on any violation of 18 U.S.C. 201(f) in connection with the Pompano Beach vacation.

[4] Niederberger's convictions were affirmed by the court of appeals. *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978).

Prior to petitioner's trial, he filed a motion to dismiss the counts charging him with violations of Section 7214(a)(2) in connection with the Pompano Beach, Miami, and Absecon vacations. He argued that because Niederberger, the only named principal, had already been acquitted of the underlying violations of Section 7214(a)(2) in connection with those vacations, petitioner, as a matter of law, could not be convicted as an aider and abettor (A. 24a-35a). The district court denied petitioner's motion to dismiss; petitioner proceeded to trial and was convicted on all nine counts.

3. The court of appeals en banc affirmed petitioner's convictions (Pet. App. 1a-72a). The court held that an aider and abettor may be convicted notwithstanding the acquittal of the principal he is charged with aiding and abetting so long as the evidence in the trial of the aider and abettor supports the finding that the principal committed the crime. The court first reviewed (*id.* at 8a-26a) the legislative history of the aider and abettor statute, 18 U.S.C. 2, and concluded that Congress intended that aiders and abettors be tried "as principals" and intended to abrogate any common-law requirement that "an accessory to a crime could not be convicted unless and until the principal whom he had assisted had been convicted of committing the substantive offense" (Pet. App. 10a). The court refused to revive that part of the common-law rule that barred conviction of an aider and abettor where the principal had been

previously acquittal, concluding that neither the language of the statute nor long-standing and relatively consistent constructions thereof supported such an exception (*id.* at 17a-21a). The court further found that (*id.* at 25a) "[n]either fairness nor justice argue for allowing these aiders and abettors to escape responsibility for their criminal activity merely because their respective principals have escaped punishments."

The court also held that nonmutual collateral estoppel did not bar petitioner's conviction (Pet. App. 26a-39a). The court noted that the application of collateral estoppel in a criminal case is not constitutionally mandated, but should apply only if it would further important policy goals or provide needed protection of defendants' rights (*id.* at 28a). In view of the number of acquittals stemming from various rules that suppress relevant evidence and the number of verdicts based on compromise or compassion, the court concluded that a verdict of not guilty in a prior case is not equivalent to a finding of innocence, that any attempt to look behind a jury verdict is fraught with difficulty (*id.* at 33a-34a), and that the application of collateral estoppel would on balance have a negative impact on the administration of criminal justice (*id.* at 28a-37a). The court concluded that although there is no way to determine the grounds for Niederberger's acquittal on several of the counts, the evidence at petitioner's trial of petitioner's guilt was overwhelming. For this reason it

concluded that fundamental fairness does not mandate the application of collateral estoppel to petitioner's case (*id.* at 38a-39a).

Judge Aldisert dissented (Pet. App. 40a-58a), concluding on two grounds that petitioner's convictions under 18 U.S.C. 2 should be reversed. He first analyzed the legislative history of 18 U.S.C. 2 and found no clear legislative intent that an aider and abettor be subject to conviction when the principal is acquitted. He therefore concluded that any ambiguity must be resolved in favor of the defendant (Pet. App. 48a-52a).[5] He further found that the conviction of an aider and abettor after acquittal of the principal results in the appearance of unequal justice and should be avoided (*id.* at 52a-58a).

Judge Gibbons dissented in a separate opinion (Pet. App. 59a-72a) on the ground that when the government had had a full and fair opportunity to litigate the issue of the principal's guilt in a prior trial the doctrine of collateral estoppel was appropriate. He was of the view that the case should be remanded to the district court for determination of that question.

SUMMARY OF ARGUMENT

18 U.S.C. 2(a) provides that "[w]hoever * * * aids, abets, counsel, commands, induces or procures [an offense against the United States] is punishable as a

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[5] Chief Judge Seitz joined in this part of Judge Aldisert's opinion.

principal." At petitioner's trial, the prosecution was able to prove beyond a reasonable doubt that petitioner aided and abetted Niederberger's receipt of gratuities from Gulf. The primary question presented by this case is whether petitioner is nevertheless entitled to a dismissal because Niederberger was acquitted in a previous prosecution. Petitioner advances two grounds for such a defense: (i) 18 U.S.C. 2 was not intended to authorize conviction of the "accessory" where the "principal" is acquitted; and (ii) the prior acquittal conclusively establishes, by virtue of the collateral estoppel doctrine, that no offense was committed, thus negating a required element of the Section 2 violation. The court of appeals correctly rejected these contentions.

I

A. The language of 18 U.S.C. 2(a) is direct, unambiguous and unqualified: "Whoever" aids or otherwise encourages a federal offense "is punishable as a principal." This language does not say that such persons are "punishable only to the extent the principal is punished" or otherwise condition their punishment on the outcome of proceedings against any other person. 18 U.S.C. 2(a) simply makes clear that any person responsible in whole or part for an offense is "punishable as a principal." In view of the statutory command that aiders and abettors be treated as principals, there is no room for adoption or perpetuation of a special rule based upon their former status at common law as accessories—a status Congress was at pains to abolish in enacting Section 2.

B. The legislative history of 18 U.S.C. 2(a) confirms that Congress intended to make each participant in a crime accountable without regard to the degree of evidence against or the ability of the government to prosecute any other participant in the offense. Prior to the enactment of 18 U.S.C. 2 in 1909, the common law and the rule observed in federal prosecutions was that all persons who aided, abetted, counseled, commanded, induced or procured a misdemeanor, or who so encouraged a felony (if present during its commission), were principals and could be prosecuted and convicted without regard to any acquittal or other outcome of any proceedings against any other participant in the crime. However, an "accessory before the fact" to a felony, *i.e.*, a participant not present at the scene of the crime, generally could not be convicted unless and until the "principal," the actual perpetrator, was convicted; and where the principal was convicted, the prosecution had to re-establish his guilt by competent proof in the subsequent proceeding against the accessory. The first of these requirements was a strict procedural bar under which an acquittal, death, or unavailability of the principal absolutely precluded any prosecution of the accessory.

The purpose of 18 U.S.C. 2 was "to make those who are accessories before the fact at common law principal offenders," thereby rendering the "obstacles to justice" imposed by the common-law procedural bar "impossible." S. Rep. No. 10 (Pt. 1), 60th Cong., 1st Sess. 13 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess. 13 (1908); 42 Cong. Rec. 586 (1908). Al-

though the legislative history did not specifically isolate the prior acquittal of the principal as one of the bars to be eliminated, that rule was simply part and parcel of the procedural bar that was being eliminated. Indeed, since the doctrine of nonmutual collateral estoppel was unheard of at the time, there would have been no reason for Congress to single out this aspect of the bar for preservation.

The legislative history is abundantly clear that Congress wished to abolish the common-law procedural bar, and it follows that Congress swept away any and all aspects of the procedural bar. Furthermore, the interpretation consistently given to 18 U.S.C. 2(a) by several courts of appeals by the time 18 U.S.C. 2(a) was amended and re-enacted in 1948 and 1951 was that a prior acquittal of one participant was of no avail to another participant. Congress is presumed to have been aware of this settled construction and to have approved it in the 1948 and 1951 legislation.

II

The doctrine of nonmutual collateral estoppel should not be extended to criminal cases. Consequently, Niederberger's acquittal did not conclusively establish, for purposes of petitioner's later trial, that no offense was committed by Niederberger. The jury in petitioner's case was entitled to reach a different conclusion as to Niederberger's guilt.

A. Nonmutual collateral estoppel is not constitutionally required. The Double Jeopardy Clause is not implicated, because the accused has not been placed in jeopardy twice. The Due Process Clause does not

require collateral estoppel even where mutuality exists, much less where it does not. *Hoag* v. *New Jersey*, 356 U.S. 464, 471 (1958).

B. Jurisprudential considerations militate against the extension of nonmutual collateral estoppel to criminal cases. Although the Court has applied nonmutual collateral estoppel to certain civil cases in order to further goals of judicial economy, criminal cases involve an altogether different consideration—the overriding public interest in complete, certain, and swift enforcement of the criminal law. That interest is subverted by any rule that spreads the effect of an erroneous acquittal to all participants in a criminal venture. Moreover, unlike the rule in civil cases, the government has no access to liberal pretrial discovery in criminal cases, no right to move for judgment notwithstanding the verdict even where an acquittal is clearly contrary to the evidence, and no right to obtain review of the correctness of such an acquittal on appeal. Unlike civil cases, therefore, the government has no recourse against verdicts based on compassion that are against the weight of the evidence. Consequently, the government does not have the same full and fair opportunity to litigate an issue that is afforded in civil procedure.

Furthermore, the introduction of nonmutual collateral estoppel to criminal cases would impose severe procedural burdens and inequities, such as the problem of deciding which of separately tried defendants must go first and the problem of determining what facts were established in previous litigation. Because there is no right to obtain review on appeal of trial

rulings adverse to the prosecution, the task of ascertaining what issues were fully and fairly resolved at the first trial would be far more burdensome than in civil cases. It is thus likely that extension of nonmutual collateral estoppel to criminal cases would waste rather than save judicial resources.

III

The jury was properly instructed that one may aid, abet, counsel, command, induce or procure the commission of a crime without necessarily entering into a conspiracy with other participants in the crime. The jury was also properly instructed that it is no defense under 26 U.S.C. 7214(a)(2) or 18 U.S.C. 201(f) that Gulf's income tax returns and reports were accurate.

ARGUMENT

I. AN AIDER AND ABETTOR MAY BE PROSECUTED UNDER 18 U.S.C. 2(a) NOTWITHSTANDING THE PRIOR ACQUITTAL OF THE ACTUAL PERPETRATOR OF THE OFFENSE

At common law, an "accessory before the fact" to a felony could not be convicted unless the "principal" (*i.e.*, the actual perpetrator of the felonious act) had previously or simultaneously been convicted. Thus, the death, escape, or acquittal of the principal felon precluded trial of the accessory. This rule was applied in federal criminal cases in the 19th century. In 1909, Congress enacted what is now 18 U.S.C. 2(a), abolishing the concept of "accessories before the fact" and ordaining that all persons aiding, abetting, counseling, commanding, inducing or

procuring offenses against the United States be treated as principals. The first question presented by this case is whether that limited aspect of the common-law procedural bar to trial of accessories to felonies foreclosing prosecution in the event of acquittal of the actual perpetrator survives as a feature of contemporary federal criminal law notwithstanding the enactment of Section 2.

A. Perpetuation Of The Common-Law Procedural Bar Relating To The Trial Of Accessories Is Contrary To The Statutory Directive Of 18 U.S.C. 2(a) That Aiders And Abettors Be Treated As Principals

In codifying the federal criminal laws in 1909, Congress adopted a provision that was the predecessor of present Section 2(a). Section 332 of the Act of March 4, 1909, ch. 321, 35 Stat. 1152, stated: "Whoever directly commits any act constituing an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." While the words "is a principal" were altered in 1951 to read "is punishable as a principal," that change was purely stylistic (see page 41, *infra*). The language of the statute plainly directs that the actual perpetrator of a criminal act and the aider and abettor be treated the same, *i.e.*, as a principal.

The wording of Section 2(a) thus allows no room for the creation or recognition of any distinction based on the accessorial status of a defendant. Since, unless this Court elects to adopt a rule of nonmutual collateral estoppel (see Part II, *infra*), the acquittal

of one principal would not bar the trial of another, the statute does not permit such an acquittal to bar the trial of an aider and abettor.[6] As we now show, this was precisely the consequence that Congress intended in enacting Section 2.

B. 18 U.S.C. 2(a) Was Enacted To Permit The Prosecution Of An Accessory Before The Fact Without Regard To The Outcome Of Any Proceedings Against The Principal

Prior to the enactment of the predecessor to 18 U.S.C. 2(a) in 1909, the federal courts had observed a common-law procedural requirement that barred conviction of an accessory before the fact to a felony

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[6] Contrary to petitioner's argument (Br. 21-22), there is no basis here for application of the rule of lenity in the construction of Section 2. Not only does the statute contain no ambiguity requiring election between a strict and a lenient reading, but the whole process of construction to which the rule of lenity applies is concerned with identification of the substantive content of a criminal prohibition. "Penal statutes are construed narrowly to insure that no individual is convicted unless 'a fair warning' [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 375 (1973), quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). See also *United States* v. *Gaskin*, 320 U.S. 527, 529 (1944); *Kordel* v. *United States*, 335 U.S. 345, 349 (1948). Petitioner had ample notice that he would be committing a federal offense if he "aided," "induced" or "procured" Niederberger's violation of Section 7214(a)(2). Inconceivable as it would be, even if petitioner knowingly committed the crime in reliance on the possibility that Niederberger would be tried first and acquitted, the fact remains that he had fair notice that his primary conduct was forbidden. The rule of lenity requires no more.

prior to the conviction of the actual perpetrator. One consequence of this rule was that an acquittal of the actual perpetrator absolutely precluded any conviction of the accessory inasmuch as the principal could never thereafter be convicted. It is undisputed in this case that the legislative history of 18 U.S.C. 2(a) demonstrates a purpose to sweep away the common-law procedural bar and to treat accessories before the fact as principals. Petitioner contends (Br. 22-23), however, as did Judge Aldisert below (Pet. App. 50a-51a), that the failure of the legislative history expressly to state that a prior acquittal of the actual perpetrator would no longer bar prosecution of the accessory suggests that Congress meant to preserve this consequence of the common-law rule.

Although it is unnecessary for Congress to repeat in its committee reports what is already evident from the statutory language, it is quite clear, when the reports are read in their contemporaneous historical context, that Congress intended a complete abolition of the common-law procedural rule. Accordingly, we now turn in some detail to the common-law rule, its application in the federal courts prior to 1909, and the contemporaneous movement to abolish the common-law rule by Congress for the District of Columbia and Alaska and by state and territorial legislatures.

1. *The Common-Law Rule*

At common law, persons responsible for a felony were classified as follows: (1) principal in the first degree (the actual perpetrator of the offense); (2)

principal in the second degree (one actually present at the crime and aiding or abetting its commission); (3) accessory before the fact (one who counsels, procures, commands, or induces the commission of the crime, but is not present at the scene); and (4) accessory after the fact (one who, knowing a crime has been committed, thereafter aids or assists a principal). See W. LaFave & A. Scott, *Criminal Law* § 63, at 495 (1972); W. Clark & Marshall, *Crimes* §§ 8.01-8.03 (7th ed. 1967); 1 H. Brill, *Cyclopedia of Criminal Law* §§ 218-249 (1922); 4 W. Blackstone, *Commentaries on the Laws of England* 33 (1765). A felony was any crime punishable by forfeiture and death.

Because all four classifications of felons received the death penalty, strict requirements were imposed in the prosecution of accessories. Among these were (i) a procedural requirement that, absent the accessory's consent (or outlawry of the principal), an accessory before or after the fact could not be convicted without the prior or simultaneous conviction of the principal offender for the same or a higher degree of crime, and (ii) a substantive requirement that in the trial of the accessory the prosecution prove that a crime had, in fact, been committed by the principal.[7] Under the procedural requirement,

[7] A judgment of conviction of the principal was merely prima facie, rebuttable proof of the guilt of the principal. R. Perkins, *Criminal Law* 654-676 (2d ed. 1969); W. LaFave & A. Scott, *supra*, at 498-501; W. Clark & Marshall, *supra*, § 8.05, at 523; 1 H. Brill, *supra*, § 253, at 454; *United States* v. *Marshall*, 26 F. Cas. 196, 201 (C.C.D. Mass. 1869) (No. 15,318).

the flight, death, or acquittal of the principal was an absolute bar to the prosecution of the accessory. In short, the accessory "followed his principal like a shadow." J. Bishop, *New Criminal Law* § 666 (8th ed.).

Significantly, these rules had limited application. Thus, the trial of a principal in the second degree was not limited by the procedural bar. Therefore, a prior acquittal of the principal in the first degree did not block the prosecution of this type of accessory. The guilt of the principal in the first degree still had to be proven, however, in the trial of the principal in the second degree. The principal in the second degree could also be convicted of a higher degree of crime (*e.g.*, murder) than the principal in the first degree (*e.g.*, manslaughter) so long as the prosecution proved the higher-degree crime had been committed. W. Clark & Marshall, *supra*, § 8.02, at 507-508, 521; R. Perkins, *supra*, at 670-671; W. LaFave & A. Scott, *supra*, at 500.

All parties responsible for misdemeanors, which were not capital offenses, were deemed principals. There were no accessories to a misdemeanor. Each person who aided, counseled, or induced the crime could be tried and convicted without respect to the outcome of any action taken against the actual perpetrator of the offense. *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1944); *United States* v. *Hartwell*, 26 F. Cas. 196 (C.C.D. Mass. 1869); W. LaFave & A. Scott, *supra*, at 496; 22 C.J.S. *Criminal Law* § 81, at 241-242 (1961); 1 M. Hale, *Pleas of the Crown* 623 n.2 (1847). Thus, for misdemeanors, one who

would be an accessory if the crime were a felony could be convicted even after the "principal" had been acquitted. *R.* v. *Burton*, 13 Cox, C. C. 71 (1875); *R.* v. *Humphreys and Turner*, [1865] 3 All E. R. Rep. 689. Nor was collateral estoppel any bar to such a prosecution—even where the same ultimate facts were in issue—because the mutuality requirement was firmly entrenched as part of the collateral estoppel doctrine. See *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912).

2. *The 19th Century Federal Rule*

The common law of principals and accessories generally prevailed in federal prosecutions prior to 1909.[8] Thus, even where a federal statute prohibited

[8] *E.g.*, *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 475-476 (1827) ("aiding and abetting" as used in statute construed to be a misdemeanor, thereby dispensing with any need to convict principal first; all parties to misdemeanors are principals); *United States* v. *Mills*, 32 U.S. (7 Pet.) 137, 141 (1833) (all parties to misdemeanors are principals); *United States* v. *Williams*, 28 F. Cas. 645, 646 (C.C.D.C. 1804) (No. 16,708) (same); *United States* v. *Burr*, 25 F. Cas. 55, 177-178 (C.C.D. Va. 1807) (No. 14,693) ("[I]f the guilt of B depends on the guilt of A, A must be convicted before B can be tried"); *United States* v. *Wilson*, 28 F. Cas. 699, 709-710 (C.C.E.D. Pa. 1830) (No. 16,730) (all participants present at a crime are principals); *United States* v. *White*, 28 F. Cas. 550, 556 (C.C.D.C. 1836) (No. 16,675) (one absent from crime but concerned in its design is an accessory before the fact); *United States* v. *Libby*, 26 F. Cas. 928, 931 (C.C.D. Me. 1846) (No. 15,597) (all participants present at a crime are principals); *United States* v. *Crane*, 25 F. Cas. 691 (C.C.D. Ohio 1847) (No. 14,888) ("If the principal is acquitted, the accessory must be discharged"); *United States* v. *Douglass*, 25 F. Cas. 896, 898 (C.C. S.D.N.Y. 1851) (No. 14,989) (all persons present and assisting at a felony are principals); *Charge to Grand Jury*, 30 F. Cas. 983, 984-985 (C.C.D. Mass. 1854) (No. 18,250) (all parties to a misdemeanor are principals); *United States* v. *Hartwell*, 26 F. Cas. 196, 198-203 (C.C.D. Mass. 1869) (No. 15,318) (all parties to misdemeanor are principals; assistants present at a crime are principals; in joint trial, jury must first determine guilt of principal and must acquit accessory if it acquits the principal; conviction or confession of absent principal admissible against accessory to establish principal's guilt); *United States* v. *Snyder*, 14 F. 554, 556 (D. Minn. 1882) (although only a postmaster could commit the offense, his aiders and abettors may be convicted as principals because the crime is a misdemeanor); *Gallot* v. *United States*, 87 F. 446, 448 (5th Cir. 1898) (unnecessary to convict principal first because statute specified that aiding and abetting the offense was a misdemeanor); *United States* v. *Williams*, 159 F. 310, 311-312 (N.D. Ala. 1908) (misdemeanor statute applies to all aiders and abettors, whether present or not, even though statute does not mention aiding and abetting).

certain acts, expressly including aiding, abetting, counseling or procuring the ultimate act itself, it was presumed that the various parties to the crime retained their common-law status. Consequently, the courts generally held that, absent consent, no trial of the accessory to a felony could precede the trial and conviction of the principal. *United States* v. *Crane*, 25 F. Cas. 691 (C.C.D. Ohio 1847) (No. 14,888); *United States* v. *Hartwell*, 26 F. Cas. 196, 199 (C.C.D. Mass. 1869) (No. 15,318). The procedural problem would have been more serious than it was had Congress not "in numerous instances expressly declared certain offenses to be misdemeanors to which it nevertheless attached the penalty of imprisonment for long terms of years," thereby avoiding the difficulties presented by the principal-accessory distinction

for felonies. *Final Report of the Commission to Revise and Codify the Laws of the United States* 199 (1906).[9]

3. *The Movement Away From the Common-Law Rule*

In time, the procedural requirement of a prior or simultaneous conviction of a principal in order to convict an accessory to a felony proved too severe. It prohibited the punishment of persons obviously responsible, at least in part, for crimes, merely because there was insufficient proof to convict the actual perpetrators or because the convictions of the "principals" could not be obtained due to death or unavailability. As the number of capital felonies decreased, the incentive to perpetuate the procedural bar diminished.[10] The 19th century and early 20th century witnessed a marked legislative trend toward the abrogation of the common-law distinctions among parties to felonies and the elimination of the procedural requirement of

[9] Cases in which the procedural bar was avoided by denominating the offense a misdemeanor include *United States* v. *Gooding, supra,* 25 U.S. (12 Wheat) at 475-476; *United States* v. *Mills, supra,* 32 U.S. (7 Pet.) at 141; *United States* v. *Williams, supra,* 28 F. Cas. at 646; *Charge to Grand Jury, supra,* 30 F. Cas. at 984-985; *United States* v. *Hartwell, supra,* 26 F. Cas. at 198-199.

[10] An 1861 English statute provided that an accessory before the fact could be "indicted, tried, convicted, and punished in all respects as if he were a principal Felon" and that he could be "indicted and convicted of a substantive Felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to Justice." The Accessories and Abettors Act, 24 & 25 Vict. c. 94 (1861).

a prior or simultaneous conviction of the "principal" in order to convict the "accessory." [11]

Congress joined this movement away from the common-law rule. In 1901, for example, Congress enacted a general penal code for the District of Columbia unambiguously abolishing the common-law procedural bar in its entirety. The code provided, among other things, that all persons "advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals, not as accessories, *the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes* * * *." Act of March 3, 1901, ch. 854, Section 908, 31 Stat. 1337; D.C. Code § 22-105 (1976) (emphasis added). As a result, the acquittal of any persons responsible for either a misdemeanor or a felony in the District of Columbia in no way discharged any other person responsible for the crime.[12]

This enactment was part of a general movement in America to abolish the procedural bar. By the time 18 U.S.C. 2 was enacted in 1909, numerous state and

[11] Other antiquated rules in the prosecution of accessories were also modified by such legislation. The common law required the acquittal of one charged as an accessory if the jury found him to have been a principal, and vice-versa. The common law also imposed strict venue requirements on the trial of accessories. These pleading and venue pitfalls were eliminated in most states by statutes allowing the jury to convict one alleged to have been an accessory as a principal and vice-versa and relaxing venue. See generally R. Perkins, *supra,* at 671-672, 677.

[12] Congress had accomplished a similar result for Alaska 1899. See note 14, *infra.*

territorial legislatures had already removed the procedural bar, and at least 14 state or territorial statutes expressly provided (or were construed to have provided) that the acquittal of an accused who at common law would have been charged as a principal was no bar to conviction of one charged with aiding and abetting the crime.[13]

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[13] By 1909, several state statutes providing that a prior or simultaneous conviction of the principal was unnecessary to prosecute a common-law accessory also expressly provided that an acquittal of the principal did not bar prosecution or conviction of a common-law accomplice. *E.g.*, Del. Laws (Rev. Code) §§ 2919-2921 (1852); Okla. Stat. § 5523 (1890); Mont. Codes Ann. (Penal Code) § 1854 (1895); N.D. Rev. Codes § 8060 (1895); S.D. Ann. Stat. § 8520 (1899); Utah Comp. Laws § 4752 (1907); Ariz. Rev. Stat. (Penal Code) §§ 845-846 (1901).

Other statutes that simply provided, as did the 1909 enactment of 18 U.S.C. 2, that any person who counseled, commanded, induced or procured another to commit a crime "is a principal" or might be tried or punished "as if a principal," or words to that effect, were construed to authorize a prosecution and conviction of common-law accomplices despite acquittals of the common-law principals. *E.g.*, *People* v. *Bearss*, 10 Cal. 68, 69-70 (1858) (Cal. Stat. ch. 99, §§ 11-12 (1850)); *State* v. *Gifford*, 19 Wash. 464, 467-468, 53 P. 709, 710 (1898) (Wash. Code of Proc. § 1189 (1891)); *State* v. *Bogue*, 52 Kan. 79, 86-87, 34 P. 410, 412 (1893) (Kan. Gen. Stat. § 5180 (1889)); *State* v. *Patterson*, 52 Kan. 335, 352, 34 P. 784, 790 (1893); *State* v. *Lee*, 91 Iowa 499, 501-502, 60 N.W. 119, 120 (1894) (Iowa Rev. Code § 4314 (1882); *People* v. *Kief*, 126 N.Y. 661, 663-664, 27 N.E. 556, 557 (1891) (N.Y. Penal Code § 29 (1895)); *People* v. *Beintner*, 168 N.Y.S. 945, 947-948 (1918) (same); *People* v. *Smith*, 271 Mich. 553, 557-558, 260 N.W. 911, 913-914 (1935) (Mich. Comp. Laws § 17253 (1929)); *People* v. *Mangiapane*, 219 Mich. 63, 65-66, 188 N.W. 401, 402 (1922) (Mich. Comp. Laws § 15757 (1915)).

Another form of statute simply provided that accessories could be tried, whether or not the principal had been previously convicted, and should be punished to the same extent as principals. Several statutes of this type were construed to authorize conviction of a common-law accessory despite the acquittal of a common-law principal. *E.g.*, *Cummings* v. *Commonwealth*, 221 Ky. 301, 313, 298 S.W. 943, 948 (1927) (Ky. Stat. § 1128 (1903)); *Commonwealth* v. *Hicks*, 118 Ky. 637, 642, 82 S.W. 265, 266 (1904) (same); *Fleming* v. *State*, 142 Miss. 872, 880-881, 108 So. 143, 144-145 (1926) (Miss. Code § 1026 (1906)). But see *People* v. *Wyherk*, 347 Ill. 28, 31-32, 178 N.E. 890, 891-892 (1931); *McCarty* v. *State*, 44 Ind. 214, 216-217 (1873); *Pierce* v. *State*, 130 Tenn. 24, 44-47, 168 S.W. 851, 856 (1914); cf. *State* v. *St. Philip*, 169 La. 468, 125 So. 451 (1929). See generally Sears, *Principals and Accessories—Some Modern Problems*, 25 Ill. L. Rev. 845 (1931); Orfield, *Criminal Law—Parties—Principal and Accessory—Effect of Statute Providing For Similar Prosecution and Punishment*, 10 Neb. L. Bull. 170 (1931); Note, *Conviction of an Accessory After Acquittal of the Principal*, 18 Colum. L. Rev. 471 (1918).

4. *The Enactment of 18 U.S.C. 2(a)*

18 U.S.C. 2(a) was enacted as part of a comprehensive recodification of federal criminal law in 1909. In 1897, Congress established the Commission to Revise and Codify the Criminal and Penal Laws of the United States. Act of June 4, 1897, ch. 2, 30 Stat. 58. During the period from 1898 to 1906, the Commission issued three reports concerning federal penal laws, consistently making three related recommendations: (i) that felony be redefined to include all serious offenses; (ii) that the term "accessory" be confined to those who, after the commission of a crime,

In the United States today, virtually all states have abrogated the distinction between principals and accessories before the fact. W. LaFave & A. Scott, *supra*, at 500. The Model Penal Code and many states hold that an acquittal of the common-law principal is no bar to the prosecution of the aider and abettor. See *Model Penal Code* § 2.04 (Tent. Draft No. 1, 1953), and state laws cited therein.

harbor or conceal the criminal; and (iii) that all other persons concerned in the commission of felonies as well as misdemeanors—before or at the fact—be tried and punished as principals.

The latter two recommendations were "[i]n accordance with the policy of recent legislation" by which "those whose relations to a crime would be that of accessories before the fact according to the common law are made principals." *Final Report of the Commission to Revise and Codify the Laws of the United States* 118-119 (1906); *Report of the Commission to Revise and Codify the Laws of the United States* S. Doc. No. 68, 57th Cong., 1st Sess. (Pt. 2) XXXI (1901). Concerning the first recommendation, the Commission observed that the word "felony" had "lost the significance which it possessed under the common law, namely, an offense which occasions a forfeiture of either lands or goods." *1906 Report* at 119; *1901 Report* at XXXI. Because the word "felony" appeared frequently in the laws of the United States, the Commission recommended that it be redefined to include any crime punishable by imprisonment for more than one year. *1906 Report* at 119; *1901 Report* at XXXI. The Commission did not suggest in any way that the redesignation of crimes previously deemed to be misdemeanors would render them subject to the common-law procedural bar, nor did it in any other way associate the redesignation with the common-law procedural bar.[14]

[14] The Commission submitted three reports. Each made the three recommendations described in the text, although in progressively different language. The first was contained in the Commission's proposed code for Alaska in 1898, see S. Doc. No. 60, 55th Cong., 2d Sess. 55 (1898), which was enacted as recommended. Act of March 3, 1899, ch. 429, Sections 184-187, 30 Stat. 1282. The second was contained in the Commission's proposed codification of federal criminal laws in 1901. Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, S. Doc. No. 68 (Pt. 2), 57th Cong., 1st Sess. 129 (1901). At that time, no final action was taken on bills embodying the proposals by Congress. *1906 Report* at 2. The third was the Commission's final report in 1906, which proposed the precise language adopted by Congress in 18 U.S.C. 2 in 1909. See *1906 Report* at 118-119, 1844.

Shortly after the Commission submitted its final report to Congress, the House and Senate established a joint committee to consider the report and make recommendations concerning it to Congress. See 42 Cong. Rec. 725 (1908). Although the joint select committee redrafted the code proposed by the Commission without incorporating many of the reforms suggested by the Commission, the committee accepted the three recommendations described above. S. Rep. No. 4825, 59th Cong., 2d Sess. (Pt. 1 at 11 and Pt. 2 at 11) (1907); S. Rep. No. 10, 60th Cong., 1st Sess., Pt. 1 at 12-13 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess. 12-13 (1908); see 42 Cong. Rec. 585 (1908).

First, the committee bill (Section 329) adopted without change the Commission's recommendation to designate any person who "aids, abets, counsels, commands, induces, or procures" the commission of "an offense" as "a principal." S. Rep. No. 10 (Pt. 2), *supra*, at 356. In identical language, the House and

Senate committee reports stated (S. Rep. No. 10 (Pt. 1), *supra*, at 13; H.R. Rep. No. 2, *supra*, at 13; 42 Cong. Rec. 586 (1908)):[15]

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[15] In the only floor colloquy concerning Section 329, Senator Heyburn stated that Section 329 was "new legislation in effect" and that "[m]any States [had] adopted this provision in order that the party who is an accessory may be punished without waiting for the punishment of the principal." 42 Cong. Rec. 1374 (1908).

The section-by-section analysis of the committees' report stated merely that Sections 329 and 330 (concerning accessories after the fact) were "new only in the sense that they are made general in their application. They explain themselves." S. Rep. No. 10 (Pt. 1), *supra*, at 26; H.R. Rep. No. 2, *supra*, at 26. Concerning Section 329, this was a reference to Sections 5323 and 5427 of the Revised Statutes. See the marginal notations in the bill at S. Rep. No. 10 (Pt. 2), *supra*, at 356-357. Section 5323 provided:

> Every person who knowingly aids, abets, causes, procures, commands, or counsels another to commit any murder, robbery, or other piracy upon the seas, is an accessory before the fact to such piracies, and every such person being thereof convicted shall suffer death.

Section 5427 provided:

> Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party.

These provisions were made "general" in the sense that aiding, assisting, counseling, commanding or procuring the commission of any federal offense were made offenses. Section 329, however, did not follow the form of Section 5323, which retained the term "accessory before the fact" and simply pro-

The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.

At common law an accessory can not be tried without his consent before the conviction or outlawry of the principal except where the principal and accessory are tried together; if the principal

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vided that such accessories would suffer the death penalty. Arguably, therefore, Section 5323 was subject to the common-law procedural requirement that the principal be first or simultaneously convicted in order to convict the accessory. On the other hand, Section 5427 did not use the term "accessory" but simply punished those who aided, abetted, counseled, advised or procured the federal felony mentioned "in the same manner and to the same extent as the principal party." In any event, whatever role the procedural bar of the common law played in prosecutions under Sections 5323 and 5427, it is clear that Congress intended to dispense with the procedural bar in 18 U.S.C. 2(a). What was made "general" about Sections 5323 and 5427 was the extension of liability for all federal crimes to all who brought them about. This eliminated the need for each federal statute expressly to refer to those who aid, abet, counsel, command, or procure the crime. The absence of such words in certain statutes had previously resulted in dismissals of indictments for counseling, commanding or procuring a crime. See, *e.g.*, *United States* v. *Ramsay*, 27 F. Cas. 694, 695 (D. Ark. 1847) (No. 16,115) (no federal statute punishes an accessory before the fact to murder). But see *United States* v. *Stevens*, 44 F. 132, 140 (D. Minn. 1890) (dictum). In this connection, although several other penal sections in the Revised Statutes expressly punished "aiding" or "aiding or abetting" (or similar wording), see R.S. 5335, 5354, 5364, 5415, 5441, 5455, 5463, 5466, 5470, 5477, 5479, 5498, 5511, 5512, 5515, 5516, 5525, 5526, none contained the comprehensive enumeration of aiding, abetting, counseling, commanding, advising or procuring incorporated from R.S. 5323 and 5427 into 18 U.S.C. 2(a).

could not be found or if he had been indicted and refused to plead, had been pardoned or died before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible.

Second, the committee adopted, although in modified language, the Commission's proposal to retain the category of "accessory after the fact" to any "offense" and to prescribe punishment of up to one-half the severity of the punishment of the principal. This was the only provision in the code mentioning the word "accessory." It was limited to accessories "after the fact." All other parties to "offenses" were "principals." S. Rep. No. 10 (Pt. 1), *supra*, at 13; H. R. Rep. No. 2, *supra*, at 13; 42 Cong. Rec. 586 (1908).

Third, as observed by the chairman of the joint select committee, Representative Moon, the committee bill, by comparison to existing law, "omitted the designation of offenses in the sections as either *felonies* or *misdemeanors* [emphasis in original], in other words [we] have abolished the existing arbitrary distinction between felonies and misdemeanors." 42 Cong. Rec. 585, 586 (1908)). Representative Moon's explanation of the procedural significance of the distinction between felonies and misdemeanors in the prosecution of offenses made no mention of any common-law procedural bar. This omission suggests that Congress did not intend, in redesignating misdemeanors as felonies, to introduce the procedural bar into the prosecution of those who aided or abetted the commission of what were redesignated as felonies

under the new code. See S. Rep. No. 10, *supra* (Pt. 1 at 12, 26 and Pt. 2 at 358 (Section 332)); H. R. Rep. No. 2, *supra*, at 12, 26.

In sum, 18 U.S.C. 2(a) was enacted to hold accountable all persons responsible for an offense against the United States, regardless of their whereabouts at the time of the crime and regardless of the degree of proof available to convict others also responsible for the offense or the ability of the government otherwise to bring them to justice.[16] This had always been the rule for misdemeanors and for all participants present at the felony. To extend this rule to all persons responsible for the offense,

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[16] These provisions were enacted (Act of March 4, 1909, ch. 321, 35 Stat. 1152) as follows:

Sec. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Sec. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.

* * * * *

Sec. 335. All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.

including those not present at the commission of what was previously a felony, Congress simply "abolishe[d] the distinction between principals and accessories [before the fact] and [made] them all principals." *Hammer* v. *United States*, 271 U.S. 620, 628 (1926) (referring to 18 U.S.C. 2(a)). No longer was one a principal to a "felony," a term which ceased to have any anchor in its common-law meaning, but to an "offense." The only "accessories" to survive the purge were accessories *after* the fact. The category of "accessory before the fact"—whose treatment at common law is the essential predicate of petitioner's theory—simply ceased to exist. This was the scheme recommended by the Commission in 1898, 1901 and 1906 and enacted by Congress in 1898 for Alaska and 1902 for the District of Columbia, and the scheme proposed by the joint committee in 1908 and enacted as 18 U.S.C. 2(a).

In discussing the meaning of the 1909 enactment, both petitioner (Br. 22-23) and the dissent of Judge Aldisert (Pet. App. 50a-51a) emphasize the absence from the House and Senate Reports of any statement of intent specifically to eliminate that aspect of the common-law procedural bar that precluded trial of an accessory to a felony if the principal had been acquitted. It is suggested that this omission, when other accomplishments of the new section were specified, signifies an intent to retain that aspect of the common-law rule. There are a number of grave obstacles to that argument:

(a) As noted above, the concept of "felony" was totally detached from its common-law meaning and redefined much more broadly, sweeping within its ambit large numbers of offenses that were theretofore denominated misdemeanors. As to all of these offenses, there were prior to 1909 no restrictions regulating trials of "accessories." Indeed, the version of Section 7214 then in effect (R.S. 3169 (1878)) was specifically stated to be a misdemeanor, so that, had petitioner's trial occurred in 1908, it is plain that Niederberger's acquittal would not have barred his prosecution.[17] Thus, the consequence of Judge Aldisert's interpretation of the 1909 legislation would be that Congress created a *new* bar to prosecution of aiders and abettors in a fairly large class of cases—including prosecutions under Section 7214—where no such bar theretofore existed. It would be more than strange to hold that Congress, stating that it intended to sweep away old barriers to prosecution of

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[17] Indeed, even had Section 7214 been classified as a felony, it is doubtful that the common-law rule would have aided petitioner. It will be recalled that an aider and abettor who was present at the scene of the felony was treated as a principal and could be convicted without the need of a prior or contemporaneous conviction of the actual perpetrator. On four of the five trips, petitioner joined Niederberger and thus was, in a sense, present while Niederberger was committing the offense (Tr. 1018-1020, 1024-1027, 1034-1036, 1096). While we do not suggest that any such consideration should govern the outcome of this case, we do believe that this point further illustrates the unreasonableness of a conclusion that Congress meant to carry forward the common-law procedural bar, with all its idiosyncracies, even in the case where the actual perpetrator of the offense has for one reason or another been acquitted.

accessories and employing language suited to that purpose, in fact was creating new barriers to prosecution in connection with all the offenses that it was reclassifying from misdemeanor to felony.

(b) The notion that underlies Judge Aldisert's view is that in 1909 Congress, while justifiably wishing to sweep away most of the procedural bar to trial of accessories, would have thought twice before eliminating the aspect that precluded trial of the accessory after acquittal of the principal. Having said nothing on that point, the argument goes, Congress ought not to be assumed to have taken such a step. This analysis looks at the 1909 enactment through 1979 glasses, based as it is on the assumption that Congress must necessarily have hesitated before withdrawing from one charged as an aider and abettor the benefit of a nonmutual collateral estoppel. But in 1909 the doctrine of nonmutual collateral estoppel was not even a gleam in legal scholars' eyes: mutuality was a clear precondition to estoppel, even in civil cases. See *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912). And as we have noted, prior to 1909 an acquittal of the principal would not have barred the subsequent conviction of another principal to the same offense, of an "accessory" who was present at the offense, or of any party to the offense if it was a misdemeanor. Given this background, combined with Congress' explicit purpose to treat what were formerly accessories before the fact as principals, it is simply untenable to suppose that Congress perpetuated, sub silentio, a prin-

ciple of nonmutual collateral estoppel that was unknown elsewhere in the law of the day and that had its common-law roots solely in the very distinction between accessories and principals that Congress was abolishing.

(c) In essence, Judge Aldisert's position hinges upon the extent to which *silence* in the legislative history can legitimately be taken to modify the apparent plain meaning of the language of the statute itself. As we have just discussed, it is in fact extremely unlikely that the congressional silence on the point here at issue could have had the significance ascribed to it, in view of the common understanding of the law at the time. But even if that were less clear, we believe the majority's criticism (Pet. App. 13a-14a) of this method of statutory construction—applying the maxim of expressio unius, exclusio alterius to the legislative history rather than to the statutory text—is well taken.[18]

C. The 1948 And 1951 Reenactments Of 18 U.S.C. 2(a) Confirm The Correctness Of The Interpretation Of The 1909 Enactment As Abolishing The Procedural Bar In its Entirety

In 1948 and 1951 Congress amended and reenacted 18 U.S.C. 2(a). These actions, we submit, served to confirm that the 1909 enactment simply obliterated

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[18] Indeed, Judge Aldisert's approach is precisely like the approach taken by the District of Columbia Circuit to avoid the plain meaning of the language at issue in *Palmore* v. *Superior Court of the District of Columbia*, 515 F.2d 1294 (1975). That statutory construction was rejected by this Court in *Swain* v. *Pressley*, 430 U.S. 372 (1977).

prior distinctions between accessories before the fact and principals.

The 1948 amendment added Section 2(b) (62 Stat. 684):

> Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

This provision was added to eliminate any doubt that "one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or intrumentality, is guilty as a principal." H.R. Rep. No. 304, 80th Cong., 1st Sess. A5 (1947).[19]

In 1951, Congress re-enacted 18 U.S.C. 2 with a set of changes designed to eliminate all doubt that—in the case of offenses whose prohibitions are directed

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[19] The House report stated (H.R. Rep. No. 304, *supra,* at A5):

> The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.
>
> It removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

See also H.R. Rep. No. 152 (Pt. 2), 79th Cong., 2d Sess. A3 (1946); H.R. Rep. No. 152 (Pt. 1), 79th Cong., 1st Sess. A3 (1945); S. Rep. No. 1620, 80th Cong., 2d Sess. (1948).

at members of specified classes (*e.g.*, bank officer, federal employee, union official, etc.)—one who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in the class to violate such prohibitions. To make this clear the 1951 amendment, among other things, changed the phrase "is a principal" in Section 2(a) to "is punishable as a principal." Act of October 31, 1951, ch. 655, Section 17b, 65 Stat. 717.[20]

By the time of these re-enactments, every court of appeals to have considered the issue had construed 18 U.S.C. 2(a) to authorize conviction of one who aided, abetted, counseled, commanded or procured a federal offense as a principal even though the actual perpetrator was acquitted. *Rooney* v. *United States*, 203 F. 928, 931-932 (9th Cir. 1913); *Kelly* v. *United*

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[20] The Senate Report stated:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.
>
> * * * It has been argued that one who is not a bank officer or employee cannot be a principal offender in violations of section 656 or 657 of title 18 and that, therefore, persons not bank officers or employees cannot be prosecuted as principals under section 2(a).

S. Rep. No. 1020, 82d Cong., 1st Sess. 7-8 (1951) (footnotes omitted).

States, 258 F.2d 392, 402 (6th Cir. 1919); *Von Patzoll* v. *United States*, 163 F.2d 216 (10th Cir.), cert. denied, 332 U.S. 809 (1947); *United States* v. *Klass*, 166 F.2d 373, 380 (3d Cir. 1948).[21] Moreover, although this Court had not yet had occasion to pass on the precise issue here by the time of the reenactments, it had observed that 18 U.S.C. 2 "abolishes the distinction between principals and accessories and makes them all principals." *Hammer* v. *United States*, 271 U.S. 620, 628 (1926). See also *Ruthenberg* v. *United States*, 245 U.S. 480, 483 (1918); *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949); *United States* v. *Hodorowicz*, 105 F.2d 218, 220 (7th Cir. 1939).

Where, as here, Congress amends and re-enacts a specific provision and does not disturb a settled judicial construction of an unamended aspect of the pro-

[21] The only arguably contrary authority was the decision of the district court in *United States* v. *Pyle*, 279 F. 290 (S.D. Cal. 1921), holding that the acquittal of the "principal" in a joint trial required an acquittal of the aider and abettor by the same jury. That decision did not rest, however, on the theory that any vestige of the common-law procedural bar remained. Instead, *Pyle* held that under 18 U.S.C. 2(a) the government must prove as an element of the offense that a crime was committed and that a jury could not reach inconsistent verdicts on this issue as to different participants in the crime. Well before the reenactment of 18 U.S.C. 2(a) in 1948 and 1951, this Court had rejected any requirement for consistent verdicts in the same trial. *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). Thus, by 1948 the *Pyle* decision was a dead letter.

vision, it should be presumed that Congress has approved that construction. *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).[22]

[22] Since 1951, the clear weight of authority among the courts of appeals has confirmed that a prior acquittal of a principal does not discharge common-law accessories before the fact. See Pet. App. 17a-21a. See also *United States* v. *Ruffin*, No. 78-1361 (2d Cir. Dec. 28, 1979) (18 U.S.C. 2(b) authorizes conviction of one who procures a crime through an innocent principal). The contrary view of the Fourth Circuit in *United States* v. *Shuford*, 454 F.2d 772 (1971), and *United States* v. *Prince*, 430 F.2d 1324 (1970), rests on a misreading of *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963). That decision reversed a state aiding-and-abetting conviction after the principals' convictions were reversed on the ground that their conduct was constitutionally protected. The Court reasoned that "there can be no conviction for aiding and abetting someone to do an innocent act." *Id.* at 265. As a matter of law, the prosecution's factual allegations therefore did not charge a punishable offense.

The Fourth Circuit misconstrued *Shuttlesworth* as holding that once the principal is acquitted by one jury, regardless of the reason for the acquittal, the aider and abettor may not be tried even though the evidence is sufficient to demonstrate conduct by the principal constituting a crime. The Fourth Circuit's position essentially applies the doctrine of nonmutual collateral estoppel. *Shuttlesworth* plainly did not go so far. The Court could only have imposed such a rule on the states on authority of the Constitution. This Court has held that nonmutual collateral estoppel is not constitutionally compelled (see page 46, *infra*), and *Shuttlesworth* in no wise indicates to the contrary. The lower court decisions cited in *Shuttlesworth* (373 U.S. at 265-266) held only that in a prosecution for aiding and abetting, the prosecution must prove the guilt of the principal.

II. THE DOCTRINE OF NONMUTUAL COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED IN A FEDERAL CRIMINAL CASE

In the preceding section of this brief we have argued that the common-law procedural bar against trial of an accessory prior to conviction of the principal did not survive the enactment of the 1909 statute eliminating the distinction between principals and accessories before the fact—even in the circumstance, as here, where the principal has been acquitted prior to the trial of the aider and abettor. The common-law rule under which the accessory could not be tried after acquittal of the principal was not in any way an application of the doctrine of collateral estoppel, since the bar to prosecution of the accessory applied quite without regard to the existence of any prior litigation (and since at the time collateral estoppel was possible only when the parties to the second litigation were the same as the parties to the first). Moreover, the position taken in Judge Aldisert's dissent in the court of appeals, proposing recognition of the common-law rule in the circumstances here, does not appear to represent a true application of collateral estoppel against the United States, since the estoppel effect of the principal's acquittal would not appear to depend on the existence of a full and fair opportunity to litigate particular factual issues at the trial of the principal.

Judge Gibbons, in his dissent, did not endorse Judge Aldisert's or the Fourth Circuit's view that special rules relating to the trial of aiders and abettors bar such prosecutions in the face of a prior

acquittal of the principal. Rather, he advanced a principle both more novel and more sweeping in its potential scope—the application of nonmutual collateral estoppel against the government in criminal cases. Under his view (Pet. App. 60a-61a), the ability of the government to maintain this prosecution of petitioner following Niederberger's acquittal would depend upon whether the acquittal of Niederberger entailed findings of fact adverse to the government, after a full and fair opportunity to litigate those facts, that are indispensable to petitioner's conviction. It is important to emphasize that this position does not depend at all on the fact that petitioner was charged and convicted solely as an aider and abettor in the counts in question here; collateral estoppel, if applicable, could equally foreclose trial of a principal after acquittal of another principal or even trial of an actual perpetrator of an offense after acquittal of an aider and abettor.

For the reasons we now set forth, we submit that it would be unwise to extend the doctrine of nonmutual collateral estoppel from civil to criminal cases.[23]

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[23] Petitioner did not assert the applicability of the doctrine of collateral estoppel at the time of trial, but only claimed generally that three counts of his indictment should be dismissed because the alleged principal had been acquitted. The issue was raised for the first time on appeal and addressed reluctantly by the court of appeals, which expressed doubt "whether the issue can fairly be said to have been raised below or preserved on appeal" (Pet. App. 27a n.44).

A. Nonmutual Collateral Estoppel Is Not Constitutionally Required

The Constitution does not bar petitioner's Section 7214 convictions even if they rest in part on facts determined against the United States in Niederberger's separate trial, to which petitioner was not a party. Although the Double Jeopardy Clause incorporates the concept that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties * * *," *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), that concept has no place here because petitioner had not litigated his guilt at Niederberger's trial. In short, having not previously been placed in jeopardy,[24] he cannot complain of double jeopardy. Nor does the Due Process Clause compel recognition of the defense of collateral estoppel in these circumstances. *Hoag* v. *New Jersey*, 356 U.S. 464, 471 (1958), expressed "grave doubts" that, even where mutuality existed, collateral estoppel was compelled by the Due Process Clause; it upheld a robbery conviction despite the fact that the same defendant had been previously acquitted on a charge identical in all material respects. A fortiori, a defendant in a criminal case has no due process right to invoke factual determinations in litigation to which he was not a party.

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[24] "The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

B. The Judge-Made Doctrine of Nonmutual Collateral Estoppel Should Not Be Extended To Criminal Cases

The question in this case thus reduces to whether the doctrine of nonmutual collateral estoppel ought to be extended in light of jurisprudential considerations of nonconstitutional magnitude to federal criminal procedure. For many years this Court, relying on nothing more than jurisprudential and historical considerations, refused to allow relitigation in the federal courts of an issue fully and fairly determined in a prior suit between the same parties (or by persons in privity with them).[25] This was true in both civil and criminal cases. See, *e.g.*, *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 316-321 (1818); *Coffey* v. *United States*, 116 U.S. 436, 442-445 (1886); *In re Neilsen*, 131 U.S. 176, 187-190 (1889); *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 48-50 (1897) (and cases cited therein); *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916); *Sealfon* v. *United States*, 332 U.S. 575, 579-580 (1948); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 577 (1974).[26]

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[25] Collateral estoppel does not apply, however, if the issues are different, even slightly. *E.g.*, *Stone* v. *United States*, 167 U.S. 178, 188 (1897); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234-235 & n.5 (1972). Nor is the government bound by an adverse determination made in a criminal case for purposes of subsequent civil litigation, where the standard of proof is less strict. *Id.* at 235; *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938).

[26] Since 1969, aspects of this rule have been held to be constitutionally required in criminal cases. *Benton* v. *Maryland*, 395 U.S. 784, 793-795 (1969), held that the Double Jeopardy

Traditionally, collateral estoppel existed only when the potential for estoppel from the first judgment was mutual. See *Bigelow* v. *Old Dominion Copper Co.*, *supra*. Recently, however, this Court has extended the doctrine of collateral estoppel, with certain qualifications, to bar relitigation of an issue fully and fairly resolved against a party in a prior civil suit when the issue arises in a subsequent civil suit against wholly different parties. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320-327 (1971) (defensive use); *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322 (1979) (offensive use). The Court has never suggested, however, that this principle of nonmutual collateral estoppel should be extended to criminal prosecutions.

The court of appeals considered at length the competing considerations concerning whether nonmutual collateral estoppel ought to be extended to criminal cases and concluded that it should not (Pet. App. 26a-39a). We agree fully with the court's analysis of these considerations and add only the following.

1. Application of nonmutual collateral estoppel to criminal cases would directly affect interests fundamentally different from the interests at stake in civil

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Clause prohibits reprosecution of the same defendant for the same offense after an acquittal. *Ashe* v. *Swenson*, 397 U.S. 436 (1970), held that a defendant acquitted of an offense could not be prosecuted for a different offense requiring relitigation of a factual issue determined in his favor in the first trial. See also *Simpson* v. *Florida*, 403 U.S. 384 (1971); *Harris* v. *Washington*, 404 U.S. 55, 56 (1971) (second prosecution based on new evidence barred by *Ashe*).

cases. In civil cases, the court serves essentially as an arbiter to resolve private disputes. The principal consideration justifying the application of nonmutual collateral estoppel in civil cases is the achievement of judicial economy in the resolution of such disputes. No intolerable injury is suffered by permitting only one full and fair opportunity to litigate factual issues in the settlement of such disputes.

Where criminal cases are concerned, however, there is an additional and overriding consideration: the effective and complete enforcement of federal criminal statutes. In fashioning judge-made rules of procedure and evidence in the federal courts, the Court has consistently struck the balance of competing considerations in favor of the "important federal interest[] * * * in the enforcement of federal criminal statutes * * *." *United States* v. *Gillock*, No. 78-1455 (Mar. 19, 1980), slip op. 12 (and cases cited therein). This federal interest was completely absent from the calculus in *Blonder-Tongue* and *Parklane*.[27] It would be

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[27] Nonmutual collateral estoppel has been applied on the civil side only where the public interest in law enforcement is not adversely affected. Although there is a public interest in the enforcement of the antitrust, securities and other laws through private civil suits, in which the public interest is collectively represented by "private attorneys general," a judgment against one such private plaintiff does not bar any other unrelated party from bringing his own suit against any wrongdoer involved in the same transaction. Even on the civil side, therefore, nonmutual collateral estoppel has only been applied where the public interest in enforcement of the law is not adversely affected. Thus, in *Parklane* the public interest in enforcement of the securities laws was actually

frustrated in at least two ways by the extension of nonmutual collateral estoppel to criminal cases.

First, as the court of appeals observed (Pet. App. 30a), extension of nonmutual collateral estoppel to the federal criminal law would frustrate the federal interest in enforcing the law to the fullest against each violator. Effective and complete enforcement depends on being able to hold accountable each participant in a crime regardless of the strength of evidence available to convict any other participant or the willingness of a jury to convict any other participant. "Spread[ing] * * * an erroneous acquittal to all those who participated in a particular transaction" would thus severely undermine the public interest in federal law enforcement (*ibid.*).[28]

Second, the introduction of nonmutual collateral estoppel into the criminal law would unduly complicate investigatory and prosecutorial decisions. At present, for example, a prosecutor is free in a case of

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strengthened by the use of offensive nonmutual collateral estoppel, and in *Blonder-Tongue* the only predominant interest affected by the defensive use of nonmutual collateral estoppel was the private interest in the monopoly created by the patent.

[28] This factor would also skew the considerations of the government in deciding whether to oppose severances. Severances ought to be requested and granted only to avoid prejudice from a joint trial. See Fed. R. Crim. P. 14. Nonmutual collateral estoppel would introduce a consequence of severance into the decision whether to oppose a severance that has nothing to do with the question of prejudicial joinder. The government would thus have an incentive to oppose severances that might otherwise be unopposed, at least in cases where the degree of prejudice from joinder is ill-defined.

organized criminal activity to prosecute the "underlings" promptly on the basis of the available evidence without fear that an acquittal will prejudice his ability to seek convictions of the "higher-ups" in the event further investigation and new evidence links them to the crime. Nonmutual collateral estoppel, however, would force prosecutors to choose between (i) prosecuting the "underling" promptly with the available evidence—at the risk of an acquittal and bar to pursuing the "higher-ups," and (ii) postponing all prosecutions while pursuing stronger evidence against the underling and other potential participants —at the risk of impeding the public interest in swift justice, injuring the individual interest in speedy trials, and risking the loss of the evidence at hand through staleness or eventual unavailability of witnesses. No such comparable public interest is affected in the civil cases where nonmutual collateral estoppel has been applied.

2. The doctrine of nonmutual collateral estoppel rests entirely on the premise that the litigant who is being held bound by a prior determination has had a full and fair opportunity to litigate the issue on which he is to be estopped. Judge Gibbons' dissent in this case recognizes (Pet. App. 65a-66a) that the prior acquittal of one alleged participant to a criminal transaction would not automatically bar trial of another participant. Each such case would require an inquiry into the circumstances of the first trial to determine whether the government was for any reason foreclosed from presenting all its evidence to

the jury, with the government able to defeat estoppel upon showing some material foreclosure.[29] Judge Gibbons concluded that such an inquiry would be as feasible in criminal as in civil cases.

But this conclusion overlooks certain fundamental structural differences between civil and criminal cases that indicate that the prosecution rarely if ever has the kind of "full and fair opportunity" to prove its case that underlies the doctrine of nonmutual collateral estoppel. To begin with, there is extremely limited pretrial discovery in criminal cases, not only under the rules but because the defendant, as well as other suspected participants in the crime, enjoy a constitutional privilege to withhold inculpatory evi-

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[29] There are numerous ways, many of them unique to criminal cases, in which the prosecution at the first trial may have been unable to present all its evidence bearing upon the factual findings as to which it could later be estopped. For instance, evidence may be excluded under the Fourth Amendment in one case, when it would be admissible subsequently against another defendant whose privacy rights were not violated. The privilege against self-incrimination may protect a witness from testifying at one trial but be waived at another. The Confrontation Clause may mandate exclusion of statements against one defendant but not against another. The speedy trial requirement may force the government to proceed against one defendant before all of the evidence is marshalled. The marital privilege may prevent testimony from being offered against one defendant which is admissible against a second defendant. Because of these and other protections accorded a criminal defendant, the government does not receive the same "full and fair opportunity to litigate" that is provided parties in civil cases. At least when the government's proof at the first trial is inhibited for any of these kinds of reasons, we assume nobody would seriously suggest that nonmutual collateral estoppel is proper.

dence. Thus, unlike a civil plaintiff, the prosecution's opportunity fully to develop its case at the first trial is perforce limited. Second, unlike civil cases, the prosecution may not move for a directed verdict in its favor or obtain a judgment notwithstanding a verdict of acquittal, even though the evidence of guilt may be overwhelming. Nor may the government move for a new trial on the ground that an acquittal was against the weight of the evidence. Finally, the prosecution may not, because of the Double Jeopardy Clause, secure appellate review of an acquittal.

In civil cases, all of these procedures constitute safeguards that insure a full and fair opportunity to litigate and that protect against erroneous factual or legal determinations. Indeed, one of the reasons that a judgment must be vacated if a case becomes moot while on appeal is to avoid any collateral estoppel effect from a determination that has not been scrutinized and sustained on review. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). In criminal cases, however, the government has no recourse against an erroneous acquittal, and, consequently, such an acquittal cannot be said to result from a full and fair opportunity to litigate the issue of guilt.

Moreover, apart from its unreviewability, there is another important reason why a jury's acquittal of one defendant should not estop the government from prosecuting a different defendant. It is well recognized that acquittals in criminal cases may result not only from a reasoned assessment of the evidence but on account of compassion, compromise, or nullifi-

cation. The present case illustrates this point quite well. The evidence convincingly demonstrates Niederberger's guilt. Nonetheless, Niederberger's jury, with respect to the Miami Beach and Absecon vacations, found him not guilty on the Section 7214(a)(2) counts but guilty on the Section 201(g) counts (Pet. App. 3a). Given the parallel nature of the counts in the context of Niederberger's case, it seems evident that his jury, because of compassion or compromise, found him guilty but rendered essentially inconsistent verdicts on the parallel charges. Nonetheless, the government had no avenue to challenge the jury's acquittals—even though they appeared to be erroneous.

3. The main rationale for nonmutual collateral estoppel is judicial economy. It is doubtful whether extension of the doctrine to criminal cases would meaningfully serve that objective. While defendants would no doubt frequently raise collateral estoppel whenever any other participation to the criminal transaction with which they are charged has been acquitted, the number of instances in which such claims are likely to prevail would probably be few—if for no other reason than that the government, with its limited resources, is unlikely to ignore the effect of a previous acquittal of one defendant when that acquittal resulted from a full opportunity to litigate and the government can present no stronger case against other defendants.

Moreover, any savings that might be effected by the elimination of a few trials (and in the instant case collateral estoppel would have accomplished no ma-

terial saving, since petitioner would still have had to stand trial on the Section 201 counts) must be weighed against the substantial costs entailed in the effort to pass upon motions to dismiss on collateral estoppel grounds. See *Sea-Land Services, Inc.* v. *Gaudet, supra*, 414 U.S. at 608-610 (Powell, J. dissenting). This inquiry would be many times more difficult than it is in civil cases, where all that must be determined is what the first fact-finder found. Those findings will ordinarily be presumptively valid. In criminal cases, the inquiry into the prosecution's full and fair opportunity to litigate at the first trial will necessitate exhaustive review of all evidentiary rulings excluding evidence proffered by the prosecution or admitting defense evidence over objections, as well as careful review of the charge to the jury—none of which will have been subject to review on appeal in the first proceeding. In short, adoption of nonmutual collateral estoppel in criminal cases is more likely to increase than to alleviate the demands upon the resources of the federal judiciary.

4. Finally, contrary to petitioner's argument (Br. 21-45), the extension of nonmutual collateral estoppel to criminal cases would not substantially enhance the perception of fairness. This argument is based on the premise that it is unfair to convict one defendant but not another when their liability turns solely on a common factual determination. This inconsistency is no more unfair, however, than the inconsistency that has long been tolerated in joint trials. For example, in *United States* v. *Dotterweich*, 320 U.S. 277, 279

(1943), an individual officer acting on behalf of a corporation was convicted, but the corporation was not. The Court rejected the officer's contention that the inconsistent verdict was impermissible (*ibid.*):

> Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.

The fact is that "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Miller* v. *California*, 413 U.S. 15, 26 n.9 (1973); *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393 (1932).

Moreover, any lack of evenhandedness that may appear to arise from such inconsistent verdicts is offset by the disparities that would result under a regime of nonmutual collateral estoppel in cases where co-participants in a crime are tried seriatim. In such circumstance, a defendant's probability of being convicted would depend in large part on how many other co-participants were tried before him. The first defendant would face the greatest risk of conviction. Each defendant tried thereafter would have not only the chance that his own jury would acquit him but the additional possibility that prior juries would have acquitted a co-participant on a common factual issue.

Obviously, the participant to go last would have the least risk of conviction.

This inequity could be avoided only by spreading the effect of any acquittal based on a common issue—even a subsequent acquittal—to discharge all participants—even those convicted before the trial in or during which the acquittal occurs. Such a solution, however, would require the government not only to convince one jury of the guilt of a participant in his own trial beyond a reasonable doubt in order to convict him but to prove his guilt beyond a reasonable doubt to two, three or as many separate juries as there were separately tried participants. This solution would impose an intolerable burden of proof on the prosecution in such cases.

5. Petitioner's suggestion that nonmutual collateral estoppel has already been applied in conspiracy cases is without merit. Although a number of lower federal courts have held, as petitioner observes (Br. 36-37), that an acquittal of all but one alleged co-conspirator in the same or different trials automatically requires the reversal of his conviction too, because "one cannot conspire with himself" (see Br. 20), this Court has never so held. The decisions cited by petitioner merely hold that a conspiracy conviction cannot stand where there is no proof or no legally sufficient proof that anyone with whom the accused allegedly conspired in fact entered into the agreement. *Morrison* v. *California*, 291 U.S. 82, 92 (1934); *Hartzel* v. *United States*, 322 U.S. 680, 682 n.3 (1944); *Bates* v. *United States*, 323 U.S. 15

(1944); see also *Gebardi* v. *United States*, 287 U.S. 112, 120-122 (1932); *Hyde* v. *United States*, 225 U.S. 347, 377 (1912). None of those decisions holds that where there is ample proof to support every element of a conspiracy, a jury may not convict only one of the alleged conspirators.[30] Although such a

[30] *Gebardi* held that the Mann Act had adopted an affirmative legislative policy not to punish the mere acquiescence of the woman in the unlawful transportation, a policy which precluded her conviction for conspiracy with a man to violate the Mann Act. Thus, as a matter of law, there was insufficient proof that the woman had made an illegal agreement. In turn, there was insufficient proof as a matter of law to support the man's conspiracy conviction, because the woman's culpable agreement was an essential element of his conviction. *Morrison* held that the proof of a conspiracy in that case rested on an unconstitutional presumption of guilty knowledge by one conspirator. As a matter of law, the remaining proof was insufficient to establish an agreement to violate the statute by that person. Since his agreement was an essential element of the offense, the proof was insufficient as a matter of law as to both alleged co-conspirators. In *Hartzel* the trial judge set aside the conspiracy convictions of two of three alleged co-conspirators for insufficient proof as a matter of law as to their involvement in the conspiracy. This, in turn, the Court held, required reversal of the conviction of the third conspirator, because their involvement in the conspiracy was an essential element of the conspiracy and the proof thereof was legally insufficient. 322 U.S. at 682 n.3 (In *Gebardi*, *Morrison* and *Hartzel* the co-conspirators were tried together). *Bates*, arising on a confession of error, held that where an accused, in order to procure gold, falsely advised his anticipated supplied (a federal agent) that he was, in effect, conspiring with Nazi agents to export the gold, the conspiracy conviction could not stand where the conspiracy concededly never existed and rested on no more than the sham representations to the anticipated supplier. Only in *Hyde* did the Court come close to deciding whether "where all but one are acquitted there can be no legal conviction as to him, the acquittal of the others being tantamount to the finding of no conspiracy." 225 U.S. at 377. The issue was not reached, however, because more than one conspirator had been convicted, and the question was in any event resolved in the government's favor by subsequent cases upholding inconsistent verdicts.

verdict would be internally inconsistent, it may only reflect jury compassion, and the Court has long accepted such inconsistencies as one of the features of the jury system. Certainly, there can be no requirement that two different juries in two different trials with only partially overlapping evidence reach the same verdict.

III. THE JURY WAS PROPERLY INSTRUCTED

Petitioner contends (Br. 15, 19-20) that the court erred in refusing to instruct the jury that, in order to convict under 18 U.S.C. 2, it had to find that petitioner and Niederberger had agreed that Niederberger receive a gratuity in exchange for his conduct in the Gulf audits. The existence of an agreement, however, is not necessary to support a conviction under 18 U.S.C. 2. *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949); *United States* v. *Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978); *United States* v. *Peterson*, 524 F.2d 167, 174 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); *United States* v. *Lane*, 514 F.2d 22 (9th Cir. 1975).[31]

[31] Petitioner's analogy to the law of conspiracy (Br. 36-37) is inapposite. With conspiracy, the combination or agreement itself is the crime. The statute outlawing conspiracies, 18 U.S.C. 371, was designed to protect society from the enhanced

Petitioner also challenges (Br. 17-18) the court's instruction that the accuracy of Gulf's returns and reports (including the Bahamas Ex Report) was irrelevant so long as the vacations were given "to create a better working atmosphere" or "for a speedy and favorable audit" (A. 48a-50a). This instruction was correct because both Sections 201(f) and 7214(a)(2) are designed to prevent officials from being tempted by unauthorized compensation—even if in particular circumstances the temptation is resisted. *United States* v. *Barash*, 412 F.2d 26, 29-30 (2d Cir.), cert. denied, 396 U.S. 832 (1969); *United States* v. *Irwin*, 354 F.2d 192, 197-198 (2d Cir. 1965); *United States* v. *Cohen*, 387 F.2d 803 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968); *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978).[32]

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danger involved in concerted criminal activity. See *United States* v. *Feola*, 420 U.S. 671, 693 (1975). The statute under which petitioner was convicted, 18 U.S.C. 2, simply defines the status of an aider and abettor as that of a principal. It does not require the existence of concerted actions or any agreement. See *United States* v. *Krol*, 374 F.2d 776 (7th Cir.), cert. denied, 389 U.S. 835 (1967).

[32] Petitioner suggests (Br. 18-19) that the trial court erroneously excluded evidence that no criminal action was taken by the Justice Department as a result of its investigation into the Bahamas Ex Report. This contention is without merit. The government established at trial that Niederberger's report on the Bahamas Exploration Corporation was submitted in 1973. Niederberger received free vacations at Gulf expense before and after (see pages 5-6, *supra*). During this period of time, as petitioner concedes (Br. 19), the Bahamas Corporation was under active criminal investigation. The fact that the Department of Justice decided in April 1975, some nine months after the last vacation given Niederberger, not to prosecute Gulf was irrelevant to any question of petitioner's previous motivation in accepting the vacations. The court therefore properly ruled such evidence inadmissible (Tr. 650-656). Moreover, like the correctness of returns filed by Gulf, the accuracy of Niederberger's report is irrelevant to violations of 18 U.S.C. 201(f). (Nonetheless, the court allowed petitioner to establish that Gulf incurred no additional tax liability as a result of further investigation into the Bahamas Corporation (Tr. 411).)

CONCLUSION

The judgment of the court of appeals should be affirmed.

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FOR ARGUMENT

In The
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October Term, 1979

No. 79-383

F. W. STANDEFER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

STATEMENT OF FACTS

The Government has again misstated the plea of guilty entered by Gulf Oil Corporation to the indictment. Footnote 1, page 3 of the Government brief, indicates that Gulf pleaded guilty to all

counts of the indictment. The docket entries in this case establish as a fact that on November 22, 1977 Gulf Oil Corporation pleaded guilty to counts 2, 4, 7 and 9. The docket entry for that date also indicates that on the Government's own motion, counts 1, 3, 5, 6 and 8 were dismissed. The counts of the indictment dismissed as to Gulf involve three of the counts of which Niederberger had been acquitted.

In its recitation of facts, the Government refers to the testimony of Harold Levin to the effect that the dates of the golf trips often coincided with important dates in the administration of the Gulf audits. (Government brief, p. 7) The entire testimony of this witness, on direct and cross-examination, appears at transcript pages 372 through 506. The cross-examination established that the witness took the date of a trip alleged in the indictment and then tried to relate it back to some act by the audit team of Gulf Oil Corporation. (Tr. pp. 410, 419, 420) It was also established that the large case teams were composed of specialists such as three engineers, a national examiner and two regular revenue agents in addition to a coordinator. (Tr. 431) The international oil pricing problems were handled by the international examiner located in Manhattan. (Tr. 433) As many as seven men worked on the Gulf audits and

devoted 1373 man days to one audit. (Tr. 441) Eleven revenue agents audited the years 1960-1961 and devoted 2596 man days. (Tr. 447) The audits were reviewed by a review staff. (Tr. 449) Similar testimony is provided throughout the cross-examination of this witness, including the travels of revenue agents from other parts of the country in connection with the audits of Gulf Oil. (Tr. 454-455) Everyone working on the Gulf audit team was a competent I.R.S. agent, performing the tasks assigned to him. (Tr. 489, 490) The recitation of the witness relating to the Bahamas Ex Report has no relevancy to Mr. Standefer since Mr. Standefer in no way participated in the preparation of that report. This was established by the testimony of Attorney Thomas Wright. (Tr. 569) It was also established that the Bahamas Ex Report was investigated by the Watergate special prosecutor's office, the Senate of the United States and did not result in any different action than that recommended in the so-called Bahamas Ex Report.

It is necessary to review the entire 1160 pages of the transcript of the trial to secure the full prejudicial impact of the Government of the United States trying Gulf Oil, who was already out of the case on its plea of guilty, rather than F.W. Standefer. The basic issue ultimately to have been

decided by the jury was whether under § 201(f) the golf trips described in the indictment were provided "for or because of any official act performed or to be performed" by Cyril J. Niederberger. The jury also was required to determine whether the golf trips represented fee, compensation or reward for the "performance of any duty" by Cyril J. Niederberger. 26 U.S.C. § 7214(a)(2).

II.

LEGISLATIVE INTENT RE 18 U.S.C. § 2

Since Standefer was not a government employee he could not be indicted under 26 U.S.C. § 7214(a)(2) as a principal. He could only have been indicted as an aider and abettor. In its argument, at page 27, the Government seems to argue that the congressional legislative intent in 1909 abolished the common-law procedural bar of the acquittal of a principal to the later conviction of an aider and abettor. A review of the cases would indicate a conflict in jurisdictions, some of which did not adopt the illogical result of allowing an accessory before the fact to be convicted after the only named and potential principal had been acquitted of the substantive crime. The inapplicability of case precedent to legislative intent should be apparent from the fact that all of

the cases cited by the Government involve common-law crimes in which the aider and abettor could be, under the facts, a principal. As Judge Aldisert noted in his dissent (Petition for Certiorari, App. A, 42a):

> "Furthermore, it is a crime to receive a gratuity under 26 U.S.C. § 7214(a)(2) only if the gratuity is received by a federal revenue agent in his official capacity. Not being a federal agent, Standefer could not have been indicted as a principal as a matter of statutory definition."

It is in this context of a statutory crime in which the principal is a defined person that takes a great deal of convoluted reasoning to sustain the conviction of an aider and abettor as a principal when he could not have been indicted as a principal and cannot, factually or as a matter of law, be a principal. The legislative history or prior decisional law does not address this narrow issue. In People v. Wyherk, 347 Ill. 28, 178 N.E. 890 (1930), at 347 Ill. 33, the court held:

> "A statute providing that an accessory before the fact may be indicted and convicted of a substantive felony whether the principal has or has not been convicted, or is or is not amenable to justice, removes the common law requirement of a prior or simultaneous

> conviction and sentence of the principal but has no application to a case in which the principal has been tried and acquitted."

The entire legislative history in the argument of the Government relates to the fact that accessories before the fact can be dealt with as principals. The elimination of procedural bars to prosecution of an aider and abettor because the principal could not be found or was not prosecuted was the procedural bar to which the legislation was addressed. The cases in which the court discussed the guilt of an aider and abettor as a principal regardless of the conviction or acquittal of the principal are cases in which the two defendants acted in concert in the commission of a crime where either could have committed the crime as a principal. They are not precedent for a case as here where Standefer could not be indicted as a principal for violation of 26 U.S.C. § 7214(a)(2). Niederberger is the only identified and named principal who could be indicted under that section. The legislative history relating to the amendment in 1951 relates to making an aider and abettor punishable as a principal in cases where he could not be indicted as a principal. That is all the 1951 amendment

intended to do.[1/]

The citation of the Model Penal Code in footnote 13 and reliance by the majority of the Court of Appeals is misplaced since the Commentary to the Model Penal Code indicates it is recommended as a change from the present status of the law -- then 1953 -- a change which Congress to this date has not yet adopted. This issue is further discussed in petitioner's brief at page 28.

III.

STRICT CONSTRUCTION OF CRIMINAL STATUTES

The Government, at page 20 of its brief, attempts to refute the application of the rule of lenity in the construction of § 2, 18 U.S.C. Mourning v. Family Publication Service, Inc., 411 U.S. 356, is cited for the proposition that:

1/ In this context the holding in United States v. Bass, 404 U.S. 336, is apposite:

> "Not wishing 'to give point to the quip that only when legislative history is doubtful do you go to the statute,' we begin by looking to the text itself."

> "Penal statutes are construed narrowly to insure that no individual is convicted unless 'a fair warning' [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."

This quote is taken from McBoyle v. United States, 283 U.S. 25 (1931), which was a criminal case, unlike Mourning, which was a civil case. Justice Holmes, in McBoyle, in the next sentence following that quoted by the Government, held:

> "To make a warning fair, so far as possible the language should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon speculation that if the legislature had thought of it, very likely broader words would have been used." (Emphasis added)

The judgment of conviction of transporting aircraft was thus reversed by this Honorable Court.

Chief Justice Marshall, in United States v. Wiltberger, 5 Wheat. 76, at page 95, held that "the tenderness of the law for the rights of individuals" entitles each person to an unequivocal warning that he is within the class of persons subject to criminal liability.

Kraus and Brothers, Inc. v. United States, 327 U.S. 614 (1946), is also cited in the Mourning case. In Kraus, Your Honorable Court held:

> "And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."

It is interesting that the Government has not attempted to address the cases cited at page 9 of petitioner's brief which relate to cases where the principal and the aider and abettor are tried jointly and in which the judge has charged the jury that where the only named and potential principal is acquitted, a jury cannot convict an aider and abettor.

IV.

LEGISLATIVE HISTORY OF 18 U.S.C. § 201(f) RE INTENT

The Government in its brief has assumed that the court below properly instructed the jury not to consider the fact that Gulf Oil incurred an additional $150 million in tax liability as the result of the I.R.S. audits on the issue of the intent of Standefer for violation of either § 201(f) or § 7214(a)(2). The issue was raised to the trial court that the assessments against Gulf Oil created a factual matter for a jury to determine whether the golf trips constituted

anything of value to Niederberger for the performance of his duty or for or because of an official act performed or to be performed by him.

The legislative history of § 201(f) would indicate it was not a malum prohibitum interdiction. After lengthy hearings before many sessions of Congress, a House report, H.R. Rep. No. 748, 87th Cong., 1st Session, 1961, regarding § 201(f) stated:

> "Subsections (f), (g), (h), (i). -- These subsections adopt the policy of five of the nine present general bribery sections (205, 206, 207, 208 and 210). They forbid offers, payments, solicitations, and receipt of things of value 'for or because of' the recipient's past or future 'official acts'." House Report, supra, at 19.

During the Senate hearing on H.R. 8140, Senator Keating noted that:

> "the [House] bill provides no prohibition against the acceptance of gifts."

and he proposed legislation to close this "loophole". Hearings on H.R. 8140 Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 8 (1962). At pages 9 and 10 of the Senate hearings, Senator Keating proposed the amendment to bar gifts if the employee had reason to believe the donor would not have given the gift but for the employee's position or from those

having business relations with the employee's agency. Attorney General Katzenbach, at the Senate hearings, page 25, indicated that the general prohibition restricting the receipt of gifts was principally a matter of individual agency regulation and he recommended against the Senator Keating proposal. Senator Keating's proposal to regulate gifts was not adopted by the Senate Judiciary Committee.

The "for or because of" language used in § 201(f), the original staff report would indicate, was aimed at rewards for an official act. Staff Report to Subcommittee No. 5 of the Committee of the Judiciary, Federal Conflict of Interest Legislation, 85th Cong. (1958).

In United States v. Brewster, 408 U.S. 501 (1972), Your Honorable Court reversed a district court demurrer and remanded the case for trial, stating that the indictment alleging bribery under § 201(c) and receipt of a gratuity under § 201(g) involved questions of fact for a jury. On remand, Senator Brewster was convicted of the gratuity section (g) and acquitted of the bribery section. On appeal, in United States v. Brewster, 506 F.2d 62 (C.A. D.C. 1974), the conviction under § 201(g) was reversed by reason of the erroneous charge of the trial court. The court of

appeals held:

> "The likelihood of misunderstanding because of failure at this point to distinguish between criminal and innocent acceptance of funds was enhanced by the very next sentence of the instruction on the lesser included gratuity offense; 'There need not be proof, however, that there was any corrupt intention on the part of defendant Brewster to be influenced in the performance of an official act.' Did this instruction rule out any criminal intent whatever under the lesser included gratuity offense? However ill-defined it may be in the exact words of the statute, there is and must be a general criminal intent on the part of the defendant to support a conviction under the gratuity section (g)." 506 F.2d at 82.

The court further held in distinguishing the bribery section from the gratuity section:

> "In contrast under the gratuity section, 'otherwise than as provided by law . . . for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, i.e., 'with knowledge that the donor was paying him compensation for an official act . . . evidence of the member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient . . .".

The court of appeals also cautioned the Government that the confusion in the charge was due to the fact that the Government insisted in proceeding under subsection (c), bribery, as well as subsection (g), gratuity, and that it would be safer for the Government on remand to go to the jury under one or the other of the sections, but not on both, since it is almost impossible for a trial judge not to confuse the jury in its instructions on both sections. The same observation is apposite when the Government has chosen to indict under 26 U.S.C. § 7214(a)(2) and § 201(f) and the confusion was alluded to by the trial court when attempting to answer the jury's inquiry on intent (A., p. 81a).

V.

ERRONEOUS INSTRUCTIONS ON INTENT

In view of the legislative history of § 201(f) and the erroneous instructions as they would relate to § 7214(a)(2), the case in the court below is similar to that of Bollenbach v. United States, 326 U.S. 607 (1946). There the trial court, as in the case sub judice, after the jury had been out for several hours was requested to give additional instructions. The trial court in Bollenbach misstated the law on presumptions as the trial court in the case sub judice

misstated the law on intent and the irrelevancy of the correctness of the returns. Your Honorable Court held:

> "But precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours . . . Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." (Emphasis added)

Your Honorable Court further held, at page 613, that:

> "A conviction ought not to rest on an unequivocal direction to the jury on a basic issue."

and finally, at page 615, Your Honorable Court concluded:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Counsel had repeatedly requested that the Government not proceed on § 7214(a)(2) and § 201(f) but make an election. This was the safer course suggested by the Court of Appeals for the District of Columbia in United States v. Brewster, supra. The instructions of the court on the specific issue of intent as those instructions were requested by the jury was misleading and eliminated the crucial factual issues for the defense from the consideration of the jury.

For the reasons hereinabove suggested, the three counts of the indictment should be dismissed and, in view of the incorrect charge of the trial court to which specific exception was taken, the prejudice to the petitioner can only be corrected by the remand for a new trial.

Respectfully submitted,

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